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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 909

WALTER E. MEYER, Intervener,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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NOTE

The following railroads are sometimes referred to as follows:

St. Louis Southwestern Railway Company as the "debtor", "St. Louis Southwestern", or "Cotton Belt."

Southern Pacific Company as "Southern Pacific".

The Chicago, Rock Island and Pacific Railway Company as "Rock Island".

St. Louis-San Francisco Railway Company as "St. Louis-San Francisco" or "Frisco".

Kansas City Southern Railway Company as "Kansas City Southern".

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BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

Statement of Matter Involved

Petitioner files this petition in behalf of himself and other stockholders of debtor, St. Louis Southwestern Railway Company.

The debtor owns and operates a railroad system extending from St. Louis and Memphis to points in Texas and Louisiana.

The road has been in reorganization since December 1935 (R. 91).

Hearings were held by the Interstate Commerce Commission in connection with the formulation of a plan of reorganization in March and April, 1937 and May and September, 1939 (R. 3497). The report of the Commission was rendered on June 30, 1941 (R. 3495); its supplemental report on March 9, 1942 (R. 3736).

Petitioner's charges

The Commission, in making its estimate of prospective earnings of the debtor for the purpose of determining capitalization in the plan of reorganization, took the record of earnings of debtor for the years 1927 to 1936 (R. 3503, 5574), and subsequently extended this period through the first six months of 1941 (R. 3690-1, 3740-1, 5574).

It is the position of petitioner that the record of earnings thus taken is a record impaired by illegal control of the debtor by successive railroads, beginning in 1925, in breach of the fiduciary and other obligations of these railroads to debtor, and in violation of the antitrust laws; and that the real earning power of the debtor is much in excess of that shown by its record of earnings, and justifies and requires a plan of reorganization providing in full for all security holders and creditors.

An equally important issue arises out of the fact that the Commission in its plan failed to subordinate the interest of Southern Pacific Company, a large creditor and stockholder, despite its wrongful and unlawful acts and failure to act in its relations with debtor both previous to and since its acquisition of stock control in 1932.

The Commission devoted the greater part of its report (R. 3547-3678) to a discussion of the proof introduced by petitioner in support of his charges, and found that said

proof was not sufficient to sustain the charges.* It is because of the failure of the District Court to review and the inadequate review by the Circuit Court of Appeals of the findings and conclusions of the Commission in respect to the said proof that petitioner, among other reasons, prays this Court to grant this petition.

It is therefore desirable to make a brief statement of some of the more salient facts underlying these charges:

Control of debtor by competitors

Up to March, 1925, Edwin Gould, a son of Jay Gould, held a dominant stock interest in debtor.

On March 11, 1925, the Chicago, Rock Island & Pacific Railway Company acquired Edwin Gould's interest. This stock, together with stock held by interests friendly to Rock Island, gave that road control of debtor (R. 5578, 3011).

Thereafter, Rock Island applied to the Commission for authority to acquire stock control of the debtor. The Assistant Director of the Bureau of Finance of the Commission in a proposed report recommended that the application be denied. He found that Rock Island was a competitor of the debtor, and admonished Rock Island for its exercise of control over the debtor without the authorization of the Commission (R. 3008-3017).

In October, 1925, Rock Island sold its dominant stock interest in debtor to the Kansas City Southern Railway Company (R. 5578). The stock thus acquired, together with the stock acquired by the latter's banking advisers, Kuhn, Loeb & Company and Ladenburg, Thalmann & Company, amounted to over 51 per cent of debtor's stock (R. 3576). The Kansas City Southern is also a competitor of debtor.

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* Chairman Eastman wrote a dissenting opinion (R. 3713-3732).

In July, 1926, Kansas City Southern applied to the Commission for authority to acquire stock control of the debtor and Missouri-Kansas-Texas Railroad (a competitor of Kansas City Southern and the debtor), which road Kansas City Southern at the time also controlled without the authorization of the Commission. The Commission in 1927 denied the applications for unification of the three roads (*Unification of Southwestern Lines,* 124 I. C. C. 401).

In its report the Commission held that the control over debtor and Missouri-Kansas-Texas by Kansas City Southern without the authorization of the Commission "constituted violations of section 7 of the Clayton Antitrust Act and perhaps also of the Sherman Act" (*id.,* at p. 430, R. 5441-5444, 5578).

The Commission also pointed out the danger to minority stockholders of debtor by the illegal control thus exercised by Kansas City Southern, through impairment of debtor's earnings by diversions of traffic, and deterioration of its property and service to patrons. "By these methods", said the Commission, "the price of the stock of the controlled carrier can be depressed and its acquisition by the controlling carrier or its stockholders facilitated" (*id.,* p. 433, R. 5444).

In 1928, at petitioner's request, the Commission brought proceedings under the Clayton Act against the Kansas City Southern to compel it to divest itself of its stock interest in the debtor and Missouri-Kansas-Texas (R. 3581).

On April 15, 1929, while the said proceedings were pending, a syndicate composed of New York Investors, Inc., its President and Chairman, and others, acquired Kansas City Southern's stockholdings in the debtor. Leading members of the said syndicate had previously actively participated in the illegal control exercised by Kansas

City Southern over debtor and Missouri-Kansas-Texas. In the opinion of Commissioner Eastman and other minority members of the Commission, the said transaction was collusive and served to continue Kansas City Southern in control of debtor. (*Interstate Commerce Commission* v. *Kansas City Southern*, 156 I. C. C. 359, 363-366, R. 5446-5452, 5579.)

Petitioner showed that data for the years 1924 to 1927 compiled by Kansas City Southern, Missouri-Kansas-Texas and debtor at the request of the Bureau of Inquiry of the Interstate Commerce Commission in connection with said Clayton Act proceedings, proved incontrovertibly that traffic in large amounts was diverted from debtor to Kansas City Southern and Missouri-Kansas-Texas during the period 1925 to 1927 (R. 1727-1787, 3472-3481).

Petitioner further showed that during the period of illegal control from 1925 to 1932, in comparison with four other railroads, competitors of debtor—the Kansas City Southern, Missouri-Kansas-Texas, Missouri Pacific and St. Louis-San Francisco, operating in the Southwestern Region, debtor failed to hold its own and suffered a loss in freight revenues of $27,626,157 (R. 3253-3257, 5583) and in earnings in the amount of $18,787,152 (R. 3260-3262); and that in comparison with the railroads of the Southwestern Region as a whole debtor failed to hold its own in freight revenues in the amount of $23,676,728 (R. 3257-3258).*

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* The "Southwestern Region" is described in the *Statistics of Railways of the United States* published by the Interstate Commerce Commission in 1935 as follows: "This region comprises the section lying between the Mississippi River south of St. Louis and a line from St. Louis to Kansas City and thence to El Paso and by the Rio Grande to the Gulf of Mexico."

Control by Southern Pacific Company

Debtor's preferred stock outstanding amounts to 198,936 shares and its common stock to 171,861 shares.

During the period 1929 to 1932, in which debtor was controlled by the aforesaid syndicate, Southern Pacific began to accumulate stock of the debtor. By April 1930, Southern Pacific had acquired 42,600 shares of the common stock. On July 15, 1930, it purchased outright from the syndicate 87,200 shares of preferred stock and entered into an agreement with Kuhn, Loeb & Company, who acted as intermediaries, to purchase from them 59,380 shares of preferred and 24,700 shares of common stock. In all, the above constituted about 57% of debtor's stock (R. 5579).

In the same month, July 1930, Southern Pacific filed its application with the Commission for authority to acquire stock control of debtor, and placed two of its officers on the board of directors. The application was granted, and on April 14, 1932, that company entered into formal control of debtor. (*St. Louis Southwestern Ry. Co. Control,* 180 I. C. C. 175; R. 3588, 3589.)

Acquisition of control gave the lines of Southern Pacific an increased haul from Corsicana, Texas, its most important point of interchange with debtor, to St. Louis, of over 700 miles (R. 1085, 5342).

In connection with its acquisition of debtor's stock, Southern Pacific made a cash investment of $19,493,589 and also exchanged 49,110 of its shares for stock of the debtor. By 1933 Southern Pacific's holdings amounted to 87.37% of debtor's entire stock (R. 5579). In June 1932 Southern Pacific guaranteed the loan by the Reconstruction Finance Corporation to the debtor in the amount of $17,882,250 (R. 851; *St. Louis S. W. Ry. Co. Reconstruction Loan,* 184 I. C. C. 74, 83).

One of the chief arguments advanced by the railroads that opposed Southern Pacific's application to acquire stock control of the debtor was that if the application were granted, Southern Pacific would be under an inducement to and would send over the debtor's rails large amounts of traffic which Southern Pacific controlled and which it was then sending over routes which it maintained jointly with debtor's many competitors, and that said competitors would no longer carry this traffic (R. 1081-1084). It was to be assumed, in view of Southern Pacific's heavy commitment in debtor, that it would use its utmost endeavors to obtain all possible traffic for the long haul over its system lines, including those of the debtor.

In November, 1932, the so-called Turney-Saunders agreement was signed, under the terms of which Southern Pacific and debtor agreed to actively and preferentially solicit all competitive traffic for the joint routes maintained by the two roads (R. 231-233, 2108). Southern Pacific, petitioner contends, while holding debtor to said agreement, itself utterly failed to carry out its part of the agreement, to debtor's great damage.

Upthegrove, President of debtor, in December 1935 testified that Southern Pacific did not solicit preferentially for debtor at the time (R. 3726-3727, 2987).

There is statistical evidence which conclusively proves this.

Debtor's freight revenues in 1931 were $16,385,466 (R. 1118). As appears from studies made by debtor's traffic department and obtained by petitioner in his examination of debtor's files in June 1939 in St. Louis, Southern Pacific as of 1931 was exchanging with competitors of debtor traffic which could have been sent over debtor and would have produced for debtor freight revenues in the amount of $14,035,807. A substantial amount of this traf-

fic, according to debtor's traffic department, Southern Pacific could have obtained at once for debtor. By 1935, the year when the petition for reorganization was filed, Southern Pacific had obtained for debtor, petitioner contends, only about $500,000 of this traffic (R. 2919-2932, 2951, 3482-3494, 2199, 5346-5348).[1]

There is also abundant documentary evidence in the record which shows that Southern Pacific did not solicit traffic preferentially for debtor as required by its agreement (*e. g.*, R. 3399-3415).[2]

Southern Pacific breached its fiduciary obligation to debtor as controlling stockholder by failing to carry out and at the same time holding debtor to the carrying out of the Turney-Saunders agreement. It also gravely breached its fiduciary obligation to the debtor in other ways to debtor's great damage (*e. g.*, R. 3423-3430).[2]

Moreover, in its relations with the debtor, in order to carry out its wrongful and illegal purposes, Southern Pacific unconscionably failed to take measures which would have increased the earnings of debtor (R. 3415-3420, 3430-3433, 3159-3163). Chief among these was a lease of the property of the debtor, which would have resulted in savings in operation to debtor of a million dollars per annum and in large increased earnings through additional traffic (R. 3163-3173, 3728-3732).[2]

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[1] Debtor in the year 1935, when the petition for reorganization was filed, failed to earn its interest charges of $3,150,307 by only $455,195 (R. 5329), or about 15% thereof. Petitioner showed that if Southern Pacific had influenced to debtor only some 3,000 cars of southbound traffic, or an average of about eight cars a day (which it readily could have done), debtor would have earned in net income an amount over and above its interest requirements for that year (R. 3161-3163). For the year 1936 debtor, despite increased expenses due to reorganization, failed to earn its interest charges by only $48,492, or about 1½% thereof (R. 5329).

[2] References are to the discussion in the brief submitted to the Commission (R. 3090-3471). There was a great deal of additional proof obtained in the hearings before Judge Davis (See R. 4051-5137).

Petitioner submitted to the Commission proof which showed that Southern Pacific's financial condition (R. 3148), and debtor's physical condition, both as to road and equipment (R. 3150-3154) and its progressive improvement in earnings (R. 3154-3157), warranted Southern Pacific in extending the small financial assistance that may have been deemed necessary to avoid reorganization. Indeed, such assistance could have been dispensed with as debtor's cash position on December 31, 1935, enabled it to meet its interest charges due January 1, 1936 (R. 3150).*

Petitioner also pointed out to the Commission the ulterior motives that prompted Southern Pacific in its control of debtor and in instigating the filing of the petition (R. 3146-3148, 3729-3731, 3137-3146, 3021-3038, 4832-4865).

In short, he showed that the proceedings were of a forced nature and that, considered from an honest business standpoint, they were neither in the interest of debtor nor of Southern Pacific Company.

Reports of the Commission

On June 30, 1941, the Commission issued its report with a plan of reorganization of debtor (*St. Louis Southwestern Ry. Co. Reorganization,* 249 I. C. C. 5, R. 3495-3735). After reviewing the proof placed in the record by petitioner in the hearings before it in support of his charges that debtor's assets had been wasted and its earnings impaired by railroads that had successively exercised control over the debtor in breach of the fiduciary and other obligations these railroads had been under to debtor and in violation of the antitrust laws, the Commission concluded

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* Six months previous to the filing of the petition, in connection with the approval of the extension of the loan by the Reconstruction Finance Corporation, the Commission found that debtor was not in need of reorganization (*St. Louis Southwestern Ry. Co. Reconstruction Loan,* 207 I. C. C. 377).

that such proof was not sufficient to sustain any of his charges (R. 3547-3678).

Chairman Eastman's dissenting opinion showed that he was convinced that petitioner had proved his charges to a very great extent (R. 3713-3732).

In its supplemental report dated March 9, 1942 (252 I. C. C. 325; R. 3736-3820), the Commission reaffirmed its original findings and conclusions.

Petitioner contends that the proof he introduced in the hearings before the Commission was more than sufficient to sustain his charges and to justify the granting of the relief requested. Assuming, however, as found by the Commission, that this was not so, petitioner submits that such proof was sufficient to require the Commission to undertake an investigation into the truth of his charges (R. 3844).

Yet, despite the fact that over one thousand security holders petitioned the Commission therefor (R. 3840), the Commission made no investigation (R. 3130-3136, 3714-3715).

Proceedings before the District Court

The petition for reorganization was filed by debtor in December, 1935, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri. Your petitioner interposed an answer challenging its good faith (R. 83-87). Hearings were held before Judge Davis, who thereafter approved the petition, holding that the only matter for the Court's consideration was the financial condition of the company (R. 91-93, 433).

Prior to the commencement of the hearings in the District Court on the plan of reorganization, the United States, through the Department of Justice, moved to intervene in the proceedings for the purpose of objecting to the plan on the ground that its approval required a construction of the

antitrust laws which would seriously impede the enforcement of said laws in the transportation field (R. 4008-4033). The motion was denied (R. 4049).

In October and November, 1942, hearings upon the objections to the plan of reorganization were held before Judge Davis. In these hearings petitioner introduced additional proof in support of his charges, in the form of testimony of witnesses and documentary evidence. This proof, petitioner submits, is of a most important nature (See R. 4051-5137).

Thereafter, and before rendering a decision, Judge Davis died. The matter coming up before Judge Moore, petitioner moved for a new trial. This was denied (R. 5564-5569).

On February 9, 1944, the District Court rendered its decision approving the Commission's reports and plan of reorganization (*In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914; R. 5183-5213). The Court held that the validity of petitioner's "charges of bad faith" was a matter "requiring study by experts on railroad affairs involving as they do * * * data peculiarly within the comprehension of the I. C. C." (R. 5203). It failed to review the evidence placed in the record by petitioner either in the hearings before the Commission or before the Court.

The trustee made investigations under subsection (c)(9) of Section 77 and rendered reports (R. 3903-3951). These investigations and reports, petitioner contends, were of a merely perfunctory nature.

Appeal to the Circuit Court of Appeals

From the decision of the District Court, this petitioner, debtor, Southern Pacific Company, and the Protective Committees for Holders of the First Mortgage Bonds of the Stephenville North and South Texas Railway Company and of the Central Arkansas and Eastern Railroad Com-

pany, appealed to the Circuit Court of Appeals for the Eighth Circuit.

The United States filed a brief *amicus curiae* in support of the position it had previously taken in its motion to intervene in the District Court (see R. 5640-5645).

The Circuit Court of Appeals affirmed the decision of the District Court (*St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. (2d) 337; R. 5559-5683).

Referring to the question of whether the Rock Island, the Kansas City Southern, the syndicate and the Southern Pacific during their successive periods of control had harmed the debtor through diversions of traffic, the Court said (R. 5587-88):

> "* * * In determining this matter, we act under definite limitations. We cannot, as would a court in an equity suit, take the evidence before the Commission and declare an opposite conclusion if, in our judgment, the weight of the evidence was against the determination of the Commission. The Commission is the agency selected by the Congress to determine such fact matters. If there is substantial support in the evidence for its determination, we must accept it as settled (*Reconstruction Finance Corporation, et al.* v. *The Denver & Rio Grande Western R. Co.*, ... U. S. .... (June 10, 1946); *Ecker, et al.* v. *Western Pacific R. Co., et al.*, 318 U. S. 448, 473, 512).
>
> "Our examination involves, of course, a test comparison of the various essential fact statements of the Commission with the evidence bearing upon each material statement to ascertain whether there is substantial support for the finding in the evidence or the action of the Commission was arbitrary."

After quoting at length from the Commission's report (R. 5588-5626), the Court continued (R. 5627):

> "* * * In many instances, there was conflict in the evidence which the Commission might have ruled either way but such conflicts are for it, with its greater expert training and experience, to resolve and not for us."

Petitioner submits that the Circuit Court of Appeals, in view of the nature of the issues raised, was under a duty to make an independent review in order to determine whether the findings and conclusions of the Commission were against the weight of the evidence.

In an earlier part of its opinion, in discussing the subject of diversions of traffic, the Circuit Court said (R. 5580):

> "Unless one is an expert in railroad traffic matters or unless one has studied a record such as this it is highly difficult, if not impossible, to have much comprehension of the very great complexity of the subject."

It is petitioner's position that the more important items of proof in support of his contentions are of a comparatively simple and non-technical character.

Debtor's relations with Southern Pacific since April 1932 form the most important part of petitioner's proof because since that time debtor has formed part of the Southern Pacific system and to that company control of debtor will be restored after reorganization. The Court, however, to a large extent limited itself to its test comparisons to proof of the waste of assets and impairment of debtor's earnings during the years 1927 to 1932 previous to control by Southern Pacific (R. 5578-5640).*

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* The only item of proof referred to by the Court and not discussed by the Commission is the testimony of and graphs prepared by Millard, debtor's comptroller (R. 5627). Petitioner in his petition for rehearing showed that the Court misunderstood this proof (R. 5794-5801).

The relations between debtor and Southern Pacific after Southern Pacific took control, go almost without review by the Court.* The Court nowhere considers whether in accordance with the Turney-Saunders agreement Southern Pacific carried out its reciprocal obligation to solicit preferentially for the important joint traffic routes maintained by Southern Pacific and debtor or the breaches by Southern Pacific of its fiduciary obligation to debtor as controlling stockholder.

Motion to remand

On August 23, 1944, the United States instituted suit under the Sherman Antitrust Act against The Association of American Railroads, forty-seven Western railroads, Kuhn, Loeb & Company, another leading New York banking firm, and others, in the District Court of the United States for the District of Nebraska, Lincoln Division.

Thereafter, and on December 7, 1944, petitioner made a motion herein before the Circuit Court of Appeals for a stay, or in the alternative that the Court remand the proceedings to the District Court with instructions to remand to the Interstate Commerce Commission (R. 5287-5493).

The motion was made on two grounds, the first being the greatly improved financial condition of debtor. The second ground had a twofold aspect: (a) that the suit under the antitrust laws constituted a new development in the affairs of debtor which, in the event of its successful termination, would result in greatly increased earnings for debtor; and (b) that the facts revealed by the allegations of the complaint in said suit, and the "Western Agreement" annexed as an exhibit to said complaint,

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* The Court reviews the proof as to Southern Pacific's failure to lease debtor (R. 5645-5652). Its holding as to this was against the weight of the evidence (R. 3163-3173); Chairman Eastman's dissenting opinion (R. 3728-3731).

constituted newly discovered evidence relevant and important to the issues herein (R. 5289).

As to the second ground, the Court overlooked the fact, as alleged by petitioner, that a successful conclusion of the Government's suit would result in greatly increased earnings for the debtor. The Circuit Court denied petitioner's motion because, as it held, he had previous knowledge of the Western Agreement (R. 5571-5573). Petitioner submits that assuming he had that knowledge, which he denies, the many thousands of security holders should not be made to suffer on that account.

Changed conditions

The plan of reorganization of the Commission was to be effective as of January 1, 1942.

The Commission placed a valuation on the property of $68,523,903 as of December 31, 1935 (R. 3501-02).

Interest charges under the plan are cut from $3,023,893 as of 1941 to $1,513,723 (R. 3782). Bondholders and other creditors remain unprovided for to the extent of $8,243,764 (R. 3782). The preferred and common stock are wiped out (R. 3700, 3784).

Since January 1, 1942, there have been reductions in principal and accrued interest on debtor's indebtedness in an amount greater than the amount unprovided under the plan for bondholders and other creditors.

Net current assets as of January 1, 1942, were $2,352,344 (R. 5259, 5261). Net current assets as of October 31, 1946, were $22,090,504, an increase of $19,738,160 (Dist. Ct. Pr. R.* 10578-9).

From January 1, 1942, to November 30, 1946, debtor earned a total net income (over and above all interest

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* District Court Printed Record.

charges) amounting to $29,373,376 (R. 5257, 5741; figures for 1946 from Moody's Railroads).

After January 1, 1942, the effective date of the plan, debtor's earnings were greater than previous to that date. Debtor earned in net income in 1941, $4,472,048; 1942, $5,673,577; 1943, $7,543,273; and 1944, $8,119,085 (R. 5257). For the first nine months of 1945 net income amounted to $6,507,850. Because of the accelerated amortization of defense projects during the last three months, debtor showed net income for the year of $3,993,006. For the first eleven months of 1946, debtor earned in net income $4,044,035.

Jurisdiction

The judgment of the United States Circuit Court of Appeals was entered on August 26, 1946 (R. 5681-5683). The petition for rehearing was filed on September 25, 1946 (R. 5829), and denied on October 22, 1946 (R. 5831).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C. A. 347 (a)] as amended.

Questions Presented

1. Where a judge who presided at the hearings upon the objections to a plan of reorganization formulated by the Interstate Commerce Commission in a Section 77 proceeding, died without rendering a decision, was it within the power of a successor judge to refuse to grant new hearings and thereafter to render his decision upon a record made before the deceased judge?

2. Where minority stockholders in a Section 77 proceeding introduced proof in the hearings before the Interstate Commerce Commission and the District Court in support of their contentions:

(a) that the earnings of the debtor taken by the Commission on which it based its estimate of debtor's prospective earnings for capitalization purposes under the plan, had been impaired by those who had controlled debtor in breach of fiduciary, contractual and other obligations and in violation of the antitrust laws, and that if the Commission had made due allowance for such impairment a plan of reorganization would have been required which would have provided for the minority stockholders; and

(b) that the claim of a large creditor and stockholder of debtor, because of its wrongful, illegal and unconscionable acts in its relations with the debtor, should be expunged or at least subordinated to the interest of other creditors and security holders, and that, as a result of such expunging or subordination, minority stockholders would be provided for under the plan;

and where the Commission held that such proof was not sufficient to sustain such contentions; and where under the plan formulated by the Commission the equity of the minority stockholders was entirely wiped out, should the District Court and should the Circuit Court of Appeals have made an independent review of the said proof and of the findings and conclusions of the Commission in connection therewith?

3. Where under a plan of reorganization in a Section 77 proceeding debtor railroad was to be restored to the control of another railroad, which latter railroad in its previous exercise of control, it was charged, had breached its fiduciary, contractual and other obligations to debtor, and where the Circuit Court of Appeals held that there was a conflict in the evidence as to which the Commission might have ruled either way, should the Commission and the District Court have made a thorough investigation of

the character of the control previously exercised in order to insure a control upon emergence from reorganization which would be in the interest of the debtor and all of its security holders?

4. Where in an appeal to the Circuit Court of Appeals in a Section 77 proceeding a motion was made to remand to the District Court with instructions to remand to the Interstate Commerce Commission on the grounds, among others, that a certain suit under the antitrust laws brought by the Government constituted a new development in the affairs of the debtor which, in the event of a successful conclusion, would result in a great increase in debtor's earnings, and also that the facts revealed by the allegations of the complaint in the said suit and by an agreement annexed as an exhibit thereto constituted newly discovered evidence, should the Court have denied the motion on the ground that the moving party had such knowledge of the facts that he was precluded from claiming that they constituted newly discovered evidence?

5. In view of the great improvement in net assets, reduction in principal indebtedness and accrued interest, improvement in net current assets and in earnings since the supplemental report of the Commission, is a new plan of reorganization necessary?

Statute Involved

The statute involved is Section 77 of the Bankruptcy Act (11 U. S. C. A. 205), and particularly subsections (b), (c)(9), (d), and (e) thereof. Certain pertinent language of said subsections is printed in the Appendix at pages 61-64 hereof.

Reasons Relied Upon for Allowance of Writ

1. The judge who presided at the hearings upon the objections to the plan of reorganization for debtor, died without rendering a decision. The Circuit Court of Appeals, in holding that it was within the discretion of the successor judge to refuse a new trial upon the issues raised, so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision, and also decided an important question of Federal law which has not been but should be determined by this Court.

2. The Commission took the record of earnings of debtor from 1927 to 1941 on which to base its estimate of prospective earnings for the purpose of determining the capitalization in the plan of reorganization of debtor. Under the plan the interest of the minority stockholders is entirely wiped out.

Petitioner introduced proof in the hearings both before the Commission and the District Court, that during the said period the earnings of debtor had been impaired through the illegal control exercised over debtor by successive railroads in breach of the fiduciary obligation these railroads were in to debtor as controlling stockholders, and in violation of the antitrust laws, and contended that but for the said impairment, the earnings would have been greatly in excess of the recorded earnings and that the Commission should have made due allowance therefor.

The Commission found that the proof did not sustain petitioner's contentions.

The District Court failed to review the proof introduced as to such illegal impairment.

The Circuit Court of Appeals, in approving the plan of reorganization without an independent review of and affirmation as to the aforesaid proof, decided a question

of Federal law probably in conflict with the decisions of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 478, 479, 514; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 536; and *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, ... U. S. ..... (June 10, 1946), Adv. Sheets 90 L. ed. 1134, 1141.*

3. The Circuit Court of Appeals, in approving a plan of reorganization which deprives minority stockholders of debtor of their entire equity in the property, without an independent review of the proof in the record on the issue raised by petitioner that Southern Pacific's claim as a creditor and as a stockholder should be expunged or at least subordinated to the interest of other creditors and security holders of debtor, decided an important question of Federal law probably in conflict with the decisions of this Court in the *Western Pacific* (p. 479), the *Milwaukee* (p. 536) and *Denver & Rio Grande* (p. 1139) cases, *supra*.

4. The Circuit Court of Appeals, in failing to hold that the claim of Southern Pacific should be expunged or at least subordinated because Southern Pacific, in preventing debtor from asserting a valuable cause of action under the antitrust laws against Kansas City Southern and others, had breached its fiduciary obligation to debtor, decided a question of Federal law in such a way as to impede the enforcement by the United States of the antitrust laws in the transportation field and in a way probably in conflict with applicable decisions of this Court.

5. The Circuit Court of Appeals, in failing to remand to the District Court with appropriate instructions to remand to the Commission on the ground that the Commission had made no investigation and the trustee, as shown by his reports, had made only a perfunctory investigation

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* These decisions are hereinafter sometimes referred to as the *Western Pacific*, the *Milwaukee*, and the *Denver & Rio Grande* cases.

of the control exercised over debtor by predecessors of Southern Pacific and by Southern Pacific, to which latter company control over the debtor will be restored after emergence from reorganization, decided an important question of Federal law contrary to the intent of Congress in enacting Section 77 as recognized by this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 471, and one which has not been but should be determined by this Court.

6. The Circuit Court of Appeals, in denying petitioner's motion to remand the proceedings to the District Court on the ground that petitioner had knowledge of the "Western Agreement" annexed as an exhibit to the complaint in the suit under the anti-trust laws by the United States against The Association of American Railroads and others, decided an important question of Federal law probably in conflict with the decisions of this Court in *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, 520, 526; *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436; and *First National Bank* v. *Flershem,* 290 U. S. 504, 525, which hold that in receivership or reorganization proceedings the court stands in a position different from that which it occupies in ordinary litigation in that every important determination in such proceedings calls for an informed independent judgment.

7. The Circuit Court of Appeals, in holding that a new plan of reorganization of debtor was not required despite changed conditions since the formulation of the plan, including a great improvement in assets, decrease in principal indebtedness and accrued interest, increase in net current assets, continuous and progressive improvement of earnings during the war, and large earnings during the post-war period, decided an important question of Federal law which has not been but should be determined by this Court. The facts as to the foregoing changed conditions serve to distinguish debtor's case from the *Denver & Rio Grande* case.

8. The Circuit Court of Appeals, in holding, in connection with its approval of the elimination of stockholders under the plan, that the amount owed by debtor to secured creditors was not to be measured by the amount of their respective claims with accrued interest but by the par value of the securities with accrued interest held as collateral by said creditors, which was much in excess of the amount due on the claims, and that this, together with the indebtedness unprovided for, was to be considered in determining that the plan formulated by the Commission was not arbitrary, decided an important question of Federal law in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *In re New York, N. H. & H. R. Co.*, 147 F. (2d) 40, 47, and of the Circuit Court of Appeals for the Seventh Circuit in *In re Chicago & N. W. Ry. Co.*, 126 F. (2d) 351, 369, and one which, irrespective of the said conflict, has not been but should be settled by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,886, In Bankruptcy, Walter E. Meyer, Intervener, Appellant, v. Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*, appellees, to the end that this cause may be reviewed and determined by this Honorable Court, and that the judgment of the said Circuit Court of Appeals be reversed; and that your petitioner have such other and further relief as may seem proper.

Dated, New York, January 17, 1947.

WALTER E. MEYER,
Petitioner, *Pro Se*,
And as Attorney for other Stockholders.

R. WALSTON CHUBB,
Attorney for Petitioner.

In the

Supreme Court of the United States

October Term, 1946

No.

Walter E. Meyer, Intervener,

Petitioner,

v.

Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The initial report of the Interstate Commerce Commission (R. 3495-3735) is reported in 249 I. C. C. 5; its supplemental report and order (R. 3736-3820) in 252 I. C. C. 325.

The opinion of the District Court (R. 5183-5213) is reported in 53 F. Supp. 914.

The opinion of the Circuit Court of Appeals (R. 5559-5680) is reported in 157 F. (2d) 337.

Statement

The statement of the case set forth in the petition under the heading "Statement of Matter Involved" is hereby adopted and made part of this brief.

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court approving the plan of reorganization of the debtor in all respects with one exception, to wit, the provisions in said plan with respect to the Stephenville North & South Texas and the Central Arkansas & Eastern bondholders.

2. In holding that it was within the discretion of Judge Moore to deny petitioner's motion for new hearings, Judge Davis, who had presided at the hearings upon petitioner's objections to the plan of reorganization, having died without rendering a decision.

3. In failing to make an independent review of the proof in the record in the hearings before the Interstate Commerce Commission and in the District Court in support of petitioner's charges of misfeasance by those successively in control of debtor, in order to determine whether the findings and conclusions of the Commission were against the weight of the evidence.

4. In failing to remand the proceedings to the District Court with instructions to remand to the Commission with appropriate instructions to prepare a new plan providing in full for all security holders and creditors of debtor but expunging or at least subordinating the claim of Southern Pacific Company on the ground that there was overwhelming proof which required such a plan.

5. In failing to remand the proceedings to the District Court with instructions to remand to the Commission on the ground that neither the District Court nor the Commission had made the thorough investigation of the previous relations of Southern Pacific Company with debtor necessary to assure sound and reliable control of debtor by Southern Pacific upon emergence from the bankruptcy court.

6. In holding that a new plan of reorganization was not required, despite the showing made by debtor in earnings since the Commission's supplemental report in March 1942, both during the war period and since the termination of the war, and despite the increase in assets, reduction in indebtedness and increase in net current assets.

7. In holding, in determining the net assets and the financial condition of debtor in order to decide whether a new plan was required, that the amount owed by debtor to Southern Pacific Company, Chase National Bank and Mississippi Valley Trust Company was to be measured, not by the face amount of the said claims with accrued interest, but by the face amount with accrued interest of the bonds of the debtor held as collateral respectively by these creditors.

8. In denying petitioner's motion made before the Circuit Court of Appeals for a remand of the proceedings to the District Court with instructions to remand to the Commission with appropriate instructions, the motion having been based on the ground that the Government's suit against The Association of American Railroads and others constituted an important development in the affairs of the debtor which in the event of a successful outcome would add greatly to debtor's earnings, and that the allegations of the complaint in the said suit and the Western Agreement annexed as an exhibit to the complaint constituted newly discovered evidence relevant and important to the issues in the case.

ARGUMENT

POINT I

The Courts failed to make an independent review in order to determine whether there was legal objection to the record of earnings taken by the Commission in estimating debtor's prospective earnings, and whether the claim of Southern Pacific Company should be expunged or at least subordinated to the interest of other creditors and security holders.

Petitioner's objections to the plan and his claims for equitable treatment include among others:

(1) That the plan failed to make any provision for stockholders and made inadequate provision for bondholders because the Commission failed to give proper weight and effect to the proof in the record that the earnings of debtor from 1927 to 1941, on which the Commission based its estimate of prospective earnings, did not represent debtor's real earning power and that the earnings for said period had been impaired through the illegal control exercised over debtor; and

(2) That the plan failed to expunge or at least subordinate the interest of Southern Pacific to the interest of other security holders and creditors. This should have been done because Southern Pacific had violated its contractual, fiduciary and other obligations to debtor, as a result of which debtor had been greatly damaged. If Southern Pacific's claim had been expunged or subordinated this would have resulted in a plan which would have taken care in full of the claims of all other creditors and security holders. (R. 3840-3848.)

The issues upon which this Court is asked to rule involve, broadly speaking, a determination as to whether

if the debtor, as petitioner contends, has been the victim of wrongdoers, these wrongdoers are to be allowed in a railroad reorganization proceeding to carry out unconscionable and unlawful purposes repeatedly condemned by this Court when resorted to in corporate reorganizations under Section 77B and in other proceedings (*Louisville Trust Co.* v. *Louisville, N. A. & C. R. Co.*, 174 U. S. 674; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483; *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, and *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510).

The facts concerning which there is controversy in these proceedings and the questions of law involved differ from those in other reorganizations that have come before this Court. In the interpretation of Section 77 herein, an opportunity is presented for further clarification by this Court as to the respective functions of the Commission and the court.

The Supreme Court in the *Western Pacific* case, in reviewing the legislative history of Section 77, states that after the bill passed the House with power lodged in the Commission, the Senate adopted changes designed to give more power to the court (p. 470). Even in the House, however, Mr. LaGuardia, chief sponsor of the bill, stated in respect to the proposed legislation that it was not intended that mistakes of law should not be rectified (72d Cong., 2d Sess., 76 Cong. Rec. 2924). Later, in connection with the amendment of the bill in 1935, it was stated that an outstanding beneficial feature of the legislation was the double check involved in the necessity of the approval of the plan by both the Interstate Commerce Commission and the courts (74th Cong., 1st Sess., 79 Cong. Rec. 13301, 13767).

The *Western Pacific* case discusses at length the respective functions of the Commission and of the court in Section 77 proceedings.

As appears from that case:

While "valuation is a function limited to the Commission" (p. 472), and it is only incumbent on the court to determine whether there is material evidence to support the Commission's appraisal (p. 473), even in such case the court is under a duty to determine whether the valuation by the Commission is in accordance with statutory standards and whether there is any valid legal objection to such appraisal (pp. 477-479).

In the discharge of its duties in "a simple case" involving no questions of law (p. 479) and where there is material evidence to support the conclusion of the Commission (p. 473), the court by a "mere mathematical computation" is able to determine whether claimants are without equity (p. 479).

Where, however, a plan allows nothing to stockholders, or to stockholders and creditors, in view of the fact that the plan is not submitted to those whose interest is thus entirely eliminated, and in view of the specificity of the direction in the statute for re-examination of the Commission's action in such case "a wider scope of review" is necessary than would otherwise be the case though not to the extent of an independent appraisal of the valuation (pp. 478-479).

It would thus appear that where stockholders, or stockholders and certain of the creditors, are being deprived of their entire interest, even on a simple state of facts involving no questions of the priority or validity of claims, or of conflicting liens, a wider scope of review than would otherwise be the case is required.

In these proceedings not only are stockholders under the plan deprived of their entire interest. There are many questions of law present arising out of petitioner's contentions as to illegal impairment of earnings and as to the priority and validity of Southern Pacific's claim.

In such case, as stated by this Court, "the court properly affirms the Commission" only "when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization. For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require an independent examination and affirmation by the court" (pp. 478-479).

The construction of the statute in the *Western Pacific* case as to the respective functions of Commission and court was expressly reaffirmed in the *Milwaukee* case (318 U. S. 523, 536), and in the *Denver & Rio Grande* case (Adv. Sheets 90 L. ed. 1134, 1139). In its careful reviews in these cases where questions of law were involved, the Supreme Court put into practice the principle it laid down.

Such a construction is justified by sound and practical reasons.

The Supreme Court in the *Western Pacific* case refers to the intent of Congress to utilize "the Commission's experience for the appraisals of values" (p. 468) and to the familiarity of the Commission with railroad securities because control over their issuance by interstate carriers had been for many years in the Commission (p. 481).

The Commission has had much experience in matters of physical valuation under Section 19a of the Interstate Commerce Act (49 U. S. C. A. 19a), and also in connection with its supervision of the issuance of securities under Section 20a of that Act (49 U. S. C. A. 20a).

It has had little or no experience in passing upon issues of the character presented by petitioner's charges.

The district courts of the United States, however, have had wide experience in questions of law and of fact in-

volving breaches of fiduciary obligations by majority stockholders, violation of the antitrust laws, breaches of contract, and unconscionable conduct of such a character that while its victims may obtain no relief in law courts, courts of equity are wont to give them relief in accordance with the doctrine laid down by this Court in *Pepper* v. *Litton*, 308 U. S. 295.

In the *Western Pacific* case (p. 471) this Court held that under subsection (e) of Section 77 "the District Court has definite responsibility in reorganization."

Among its duties is the duty of holding hearings upon objections and thereafter of approving or disapproving the plan of the Commission. "If the judge shall not approve the plan, he shall file an opinion stating his conclusions and the reasons therefor * * *" (Subsection (e)).

Another responsibility is to require the trustee, in accordance with the provisions of subsection (c)(9) to report to the court "any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation."

In the effective discharge of its responsibility to review under the statute the district court is in a specially advantageous position.

As the court of original jurisdiction the district court hears all motions by parties in interest. Through the numerous applications which the trustee makes for authorization to act, the court acquires a knowledge of the affairs of the debtor. The responsibility imposed under the statute of holding hearings upon objections and requiring the trustee to report, carries with it opportunities to get at the facts with respect to any fraud, misconduct and mismanagement.

In its opinion the District Court below, through Judge Moore, held (R. 5203):

"* * * a determination of the validity of Meyer's charges of bad faith are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."

The District Court set forth certain of petitioner's charges and certain items of proof introduced by him in support thereof (R. 5197-5198).

It formally found that the valuation and capitalization under the plan of reorganization were "in accordance with proper legal standards" and "that the legal conclusions stated by the Commission" in its reports "are in accordance with the law of the land" (R. 5212).

As indicated by the language first quoted, and as appears from its entire opinion, the District Court, however with one exception, made no attempt to pass upon the findings of fact and conclusions of the Commission bearing on petitioner's charges.*

* The sole exception was the comment on the Turney-Saunders agreement, under which the debtor and Southern Pacific agreed to actively and preferentially solicit traffic for the Cotton Belt-Southern Pacific joint traffic routes. The Court refers to the proviso in that agreement that "routings would be such as to permit maximum revenue to the Southern Pacific system and that the Southern Pacific maintain fair interchange of traffic with other lines" (R. 5198). Paragraph 2 of the agreement states: "Southern Pacific will actively and preferentially solicit all competitive traffic which can be handled by the Cotton Belt in connection with that Line, provided that the Maximum gross revenue is thereby yielded to the System, including within the term 'System,' the Cotton Belt Lines * * *" (R. 231). The above language of the Court fails to bring out that in the determination of what was the maximum revenue to the Southern Pacific the debtor (Cotton Belt) was to be included.

The proof introduced by petitioner in the District Court before Judge Davis, who had presided at the hearings, also went without review by Judge Moore. The testimony and exhibits in these hearings cover over one thousand pages of the printed record (R. 4051-5137). Of these pages at least two-thirds, petitioner estimates, are taken by petitioner's proof. This proof is of a most important character despite the fact that petitioner was limited by Judge Davis to the period after the conclusion of the hearings before the Commission in September 1939 (R. 4186). It includes (a) new important proof, and (b) cumulative proof of matters in the record in the hearings before the Commission in support of petitioner's charges. This proof has had the benefit of review neither by the Commission nor by the District Court, nor, as will be shown, by the Circuit Court of Appeals.

The District Court failed to make that minimum review of the findings and conclusions of the Commission required even in a "simple case" of valuation in order to determine whether there was material evidence to support the conclusions of the Commission. In the instant case, where stockholders are being deprived of their entire equity, and where many questions of law and mixed questions of law and of fact have been raised, the error of the District Court in failing to make an independent review resulted in depriving the stockholders of an important safeguard provided under the statute.

Nor was the failure by the District Court to review remedied by the inadequate review by the Circuit Court of Appeals. The special facilities afforded the District Court in getting at the truth in the discharge of its responsibilities of review have been referred to.

These facilities are not available to an appellate tribunal.

The Circuit Court of Appeals erred not only in failing to review as to the weight of the evidence and in limiting

its review to whether there was substantial support in the evidence for the determination of the Commission. It also erred in reviewing only by test comparisons.

Whatever the propriety of test comparisons in certain cases, petitioner submits that their use was not proper in the instant case.

Of the methods to be pursued in the analysis of evidence, Professor Wigmore states:

> "The object, of course, is to determine rationally the *net persuasive effect of a mixed mass of evidence.* Many data, perhaps multifarious, are thrust upon us as tending to produce belief or disbelief. Each of them (by hypothesis) has some probative bearing. Consequently, we should not permit ourselves to reach a conclusion without considering all of them and the relative value of each. Negatively, therefore, our object is (in part) to avoid being misled (it may be) through noticing only some fragment in the mass of data while ignoring some other fragment, or through overvaluing or undervaluing any fragment. We must assume that a conclusion reached upon fragments only will be more or less untrustworthy * * * (John H. Wigmore, *The Science of Judicial Proof,* pp. 46-47).

The test comparisons were as to proof of waste of assets and impairment of earnings of debtor during the years 1927 to 1932.

The most important part of petitioner's case,—the relations of debtor with Southern Pacific Company after 1932 when debtor became part of the great Southern Pacific System, and the abundant proof in the record bearing on such relations,—remained to a very great extent without review by the Court.

In its test comparisons as to whether there was substantial support in the evidence for the determination of the

Commission, the Circuit Court of Appeals either misunderstood the purpose or the nature of the proof. In some instances the Court did both (Petition for rehearing, R. 5791-5812).

In its review the Circuit Court of Appeals found that: "In many instances, there was conflict in the evidence which the Commission might have ruled either way * * *" (R. 5627).

In reviewing to determine only whether there was substantial proof to support the findings and conclusions of the Commission on questions of law and mixed questions of law and fact, and this by test comparisons, the Circuit Court erred. This has resulted in a grave injustice to the minority stockholders and to other security holders of debtor.

Petitioner under this point heading has referred to two issues raised by his objections,—the issue as to whether debtor's earnings were illegally impaired and the issue as to whether the claim of Southern Pacific should be expunged or at least subordinated. Any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the two issues would be purely academic, as all of the proof relevant to the issue as to whether debtor's earnings were illegally impaired is also relevant to the issue as to whether Southern Pacific's claim should be subordinated or expunged.

The Commission recognized that this was so when, referring to petitioner's brief (R. 3176, *et seq.*), it stated:

> "Meyer argues, and correctly so, that facts concerning the alleged breaches of fiduciary relationship to the debtor, and violations of the antitrust laws, are relevant in support of an effort to prove that the record of earnings of the debtor for the years 1927 to 1936 was not indicative of its real earning power on the basis of which a plan of reorganization may be

formulated, and to prove that the debtor has causes of action against those who, as alleged, conspired in the wrongdoing" (R. 3567).

Southern Pacific's claim is in the principal amount of $17,882,250 with accrued interest. Proof bearing on the issue as to its priority and validity includes wrongful and illegal acts by Southern Pacific both previous to and after taking formal control of debtor with the authorization of the Commission in April, 1932.

The Circuit Court of Appeals, however, limits its discussion of this aspect of petitioner's proof to the brief filed by the United States through the Antitrust Division of the Department of Justice (R. 5640-5645).

The Government contended that Southern Pacific's failure to permit the debtor to assert causes of action *under the antitrust laws* against Kansas City Southern and others arising out of impairment of earnings by reason of control over debtor by Kansas City Southern, "was a breach of trust which Southern Pacific is bound to account for" and which called for the subordination of Southern Pacific's claim in the plan of reorganization (R. 5641).*

The Court asked why the Government did not prosecute the Kansas City Southern if it deemed that that railroad had violated the Antitrust Act (R. 5644). It is the duty

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* The Court makes the comment that: "In some respects, this last hour appearance of the Government is extraordinary" (R. 5644). The Court is under a misapprehension. The Government's brief was filed with the Circuit Court of Appeals in February, 1945. Over two years before that time, however, in September, 1942, in the hearings before Judge Davis upon the objections to the plan of reorganization, the Government filed a motion to intervene and brief in support in which the Government contended that Southern Pacific should be subordinated. These form part of the printed record (R. 4007-4033). The motion was denied (R. 4049-4050).

of the Interstate Commerce Commission, not of the Attorney General, to institute proceedings against railroads for violations of Section 7 of the Clayton Antitrust Act. The Commission instituted and afterwards discontinued such proceedings by a vote of six to five (*Interstate Commerce Commission* v. *Kansas City Southern,* 156 I. C. C. 359; R. 5446-5452).

As to the holding by the Court that if it should be made to appear that a cause of action existed, the proper procedure would be to have such action placed in a trustee with proper provisions as to the disposition of any recovery (R. 5645).

The *amicus curiae* brief filed by the Government, quoted at length by the Court, shows that while debtor could have asserted causes of action up to April 15, 1934, "the inaction" of Southern Pacific for a period of four years had "permitted those primarily liable to escape liability through the running of the statute of limitations" (R. 5644).

The Circuit Court of Appeals was also of the opinion that because of the uncertainty in the amount of any recovery if suit were brought against Southern Pacific, for that reason, among others, the claim against Southern Pacific should not be subordinated.

The fact that there is uncertainty as to the amount of ultimate recovery does not preclude subordination. *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307, 323-324; *Columbia Gas & Electric Corp.* v. *United States,* 6 Cir., 153 F. (2d) 101, 102; *In re Commonwealth Light & Power Co.,* 7 Cir., 141 F. (2d) 734, 739.

POINT II

Both the Commission and the District Court failed to make the thorough investigation necessary to assure control of debtor in the interest of debtor and of all of its security holders upon emergence from reorganization proceedings.

The Congressional debates prior to the enactment of Section 77 show that one of the chief purposes of the bill was to take railroad reorganizations out of the hands of the group of men who had made it a practice to wreck railroads (72nd Cong. 2d Sess., 76 Cong. Rec. 4887, 5358).

The Supreme Court in the *Western Pacific* case (at p. 471), in discussing the legislative history of Section 77, quoted from the Senate Report upon the amendment enacted in 1935 as follows:

> "The Senate Report, No. 1336, 74th Cong., 1st Sess., concluded:
>
> 'The amendments to Section 77 leave unimpaired the power and the duty of the commission and the courts to deal with the most important feature of all reorganization plans, that of the control of the reorganized company; and similarly the commission and courts will continue to have the power and authority of making that thorough investigation which is necessary to assure sound and reliable control for bankrupt companies when they emerge from the courts, in place of the type of control under which some railroads have been wrecked'."

Under Section 12 of the Interstate Commerce Act (49 U. S. C. A. 12) the Interstate Commerce Commission is given broad investigatory power (*Smith* v. *Interstate Commerce Commission*, 245 U. S. 33). In numerous instances the Commission has used this power to expose abuses in the control and operation of railroads (*Consolidations and*

Combinations of Carriers, 12 I. C. C. 277; *St. Louis and San Francisco Railroad Investigation,* 29 I. C. C. 139; *Financial Investigation of New York, New Haven & Hartford R. R. Co.,* 31 I. C. C. 32; *Pere Marquette R. R. Co. & C., H. & D. Ry. Co.,* 44 I. C. C. 1; *Denver & Rio Grande Investigation,* 113 I. C. C. 75; *Chicago, Milwaukee & St. Paul Investigation,* 131 I. C. C. 615; *New York, N. H. & H. R. Co. Investigation,* 220 I. C. C. 505).

Petitioner submits that the facts in the record constitute overwhelming proof of his charges. Assuming, however, that these facts were not sufficient to convince the Commission as to the truth of these charges, certainly they were sufficient to require the Commission to institute an investigation. Yet no investigation was ever made by the Commission in these reorganization proceedings.

Within a few days after the initiation of the reorganization proceedings on December 12, 1935, petitioner asked, at an informal hearing granted by Division 4, that the Commission investigate the effect of the control by Southern Pacific and predecessors of Southern Pacific upon the traffic and earnings of the debtor, and presented facts to that end. The Chairman of the Division stated that an investigation was not warranted at the time but that an opportunity would be "presented in connection with consideration of a plan of reorganization" of debtor "to investigate all phases of its traffic problems and relations with other carriers" (R. 451).

At the hearings in connection with the formulation of a plan in 1937, the Commission introduced no proof whatsoever on the subject of debtor's traffic relations with other railroads. Petitioner took the stand and endeavored to introduce such proof. He was not permitted to do so (R. 458-462).

On or about April 12, 1937, petitioner filed with the Commission a petition for investigation (R. 339-351). He

asked that the hearings remain open pending a decision upon his petition (R. 359). The hearings were closed. On June 21, 1937, he filed an amended and supplemental petition (R. 357-467) requesting that the Commission investigate. Thereafter the petitions were denied (R. 479-480).

Other security holders joined in the petition for investigation at the time or later, in all amounting to 1188 bondholders owning $4,200,000 par value of bonds and 148 stockholders owning, together with petitioner's, stock of a par value of $4,230,900 (R. 3840).

By order of January 10, 1939, the Commission finally reopened the proceedings. The reopened proceedings, however, were in no sense an investigation. The Commission called no witnesses, nor did it place any documentary evidence in the record with the exception of a report of the Bureau of Inquiry on data hitherto not made public. This data was obtained as a result of an investigation conducted during the years 1927-1929 of the traffic relations respectively of the debtor, of Kansas City Southern and of Missouri-Kansas-Texas with other railroads for the period 1924 to 1927 only (R. 3600-3604, 1727-1787; 5777-5783).

Southern Pacific refused to produce documentary evidence called for by petitioner, stating that the reopened proceeding was an adversary proceeding (R. 1574, 1588).

That the reopened proceedings were not an adequate substitute for an investigation is evident from the fact that petitioner was given but a very limited opportunity to obtain additional proof in support of his charges. A motion made by him for a postponement of four months in order that he might take the depositions of witnesses residing at distant points was denied (R. 522, 528-529).

Petitioner expressed the opinion that the relation of Southern Pacific with debtor was the "jugular vein" of the case (R. 1590). He filed a petition for a subpoena

duces tecum to be directed to Southern Pacific (See R. 3470-3471). This, except in very small part, was denied (R. 1633-1634, 1646, 1648-1649, 1655 *et seq.*).

His request that the Commission require Southern Pacific to compile data of its traffic relations with competitors of debtor, even after the request was modified so as to include only one day of every month for the year 1935 *or* 1938, was denied (R. 513-522, 508, 528-529).

The Commission states (R. 3674):

> "As for the production of correspondence files of the Southern Pacific, those files are also large, and, moreover, that carrier has a property right in its files, and is entitled to keep its own counsel until there is some reasonable showing that the public interest or the ends of justice require a disclosure."

Only after the adjournment of the May 1939 hearings, and after almost all of the witnesses called by debtor and by Southern Pacific had testified, was petitioner in June, 1939, given access to a limited number of the debtor's files in St. Louis. A selection from the important documentary evidence obtained by petitioner in his examination and submitted at the September 1939 hearings, appears in the printed record (R. 2735-2976).

The Commission in its report refers a number of times to "investigations", viz., "Investigations on our own motion" (R. 3600); the "exhaustive investigation which has been made" (R. 3674); and "We are of the opinion that the investigations already made are sufficient, * * *" (R. 3676).

The "Investigations on our own motion" refer to the investigation by the Bureau of Inquiry made during the years 1927-1929 of traffic relations for the years 1924-1927, previously referred to.

Chairman Eastman in his dissenting opinion dwells at length on the fact that the Commission made no investigation (R. 3714-3715).

As to the reports of the trustee:

The trustee of the debtor was ordered by the District Court under date of February 24, 1936, "in accordance with the mandatory provisions of paragraph (c)(9) of amendatory Section 77 of the Acts of Congress relating to bankruptcy" "to report to the Court any facts pertaining to irregularities, fraud, misconduct or mismanagement, as consequence of which the Debtors, or any of them, may have a cause of action arising therefrom against any person or corporation" (R. 3903).

The trustee issued seven reports in which the matters which he was ordered to investigate are referred to. These reports are dated as follows: February 23, 1937 (R. 3903-8); February 25, 1938 (R. 3909-21); February 28, 1939 (R. 3921-33); April 5, 1940 (R. 3933-42); March 21, 1941 (R. 3942-47); April 22, 1942 (R. 3948-50); May 7, 1943 (R. 3950-51).

Preparatory to his first report of February 23, 1937, the trustee wrote to the officials of debtor and asked them to make affidavit to the fact that they knew of no frauds or irregularities (R. 3904). It was hardly likely that officials, if they were desirous of retaining their positions, would come forward with information as to frauds and irregularities.

The trustee also asked the trustees under the respective mortgages of the debtor whether they knew of any frauds or irregularities (R. 3905). No information was forthcoming in reply to this inquiry.

The only other matter considered by the trustee was petitioner's charge that debtor had a cause of action against Pacific Fruit Express because of its exorbitant car rental charges. Southern Pacific owns 50% of the

stock of Pacific Fruit Express. The matter is discussed in the trustee's second report, dated February 25, 1938 (R. 3911-15). The trustee concluded that petitioner's contentions as to this were not well founded (R. 3915). The record is to the contrary (R. 5337, 5374-5379).

The succeeding reports of the trustee, insofar as they refer to petitioner's charges, are mere recitals of the results of the proceedings before the Commission and in the District Court.

It is apparent that the trustee's investigations and reports were of a perfunctory nature.

POINT III

Petitioner's motion to remand should have been granted.

On August 23, 1944, the United States instituted suit in the District Court of the United States for the District of Nebraska, Lincoln Division. The complaint in the suit charges a conspiracy under Sections 1 and 2 of the Sherman Antitrust Act. The defendants include The Association of American Railroads; The Western Association of Railway Executives; J. P. Morgan & Company, Incorporated; Kuhn, Loeb & Company; forty-seven Western railroads, constituting all of the important railroads owning lines west of the Mississippi; the Commissioner and Assistant Commissioner under the "Western Agreement"; and some eighty-seven other individuals, officers or directors of The Association of American Railroads or associated with The Western Association of Railway Executives, or members of the Committee of Directors established under the Western Agreement (R. 5380-5440, 5571).

Among the railroads or their respective trustees joined in the Government suit are a number of railroads charged by this petitioner, long previous to the bringing of the

Government suit, as having been implicated in the conspiracy in violation of the antitrust laws, by which control was exercised over debtor to its great damage. These include the Rock Island, in connection with the assertion of the claim against which company in behalf of debtor petitioner has come before this Court (*Meyer* v. *Fleming*, ... U. S. .... (Feb. 4, 1946), Adv. Sheets 90 L. Ed. 422; R. 4823-28); Kansas City Southern, Missouri-Kansas-Texas and the Southern Pacific (R. 341, 363, 3566 *et seq.*).

Petitioner further charged that Union Pacific and Illinois Central were also implicated in said conspiracy. Union Pacific and Illinois Central both participate in traffic routes which are potentially competitive with routes jointly maintained by Southern Pacific and debtor. (R. 3021-38; 4832-65; 743.)

On December 7, 1944, petitioner moved in these proceedings before the Circuit Court of Appeals for a stay, or, in the alternative, for a remand to the District Court with instructions to remand to the Commission (R. 5287-5493). As set forth in the motion (R. 5289):

> "The grounds for asking the relief sought herein are:
>
> "(1) The greatly increased balance of assets over liabilities and the greatly improved financial condition and earnings of the debtor since the supplemental report of the Commission of March 9, 1942; and
>
> "(2) The suit by the Government under the Sherman Antitrust Act against The Association of American Railroads, et al., and the facts revealed by the allegations of the complaint in the said suit and the 'Western Agreement' annexed as an exhibit to the said complaint.
>
> "The said suit constitutes a new development in the affairs of the debtor. In the event of a successful conclusion of the said suit, a change in the relations of the debtor with Southern Pacific and other railroads will

be assured, which will greatly increase debtor's earnings in normal times.

"The facts revealed by the allegations of the complaint in the said suit and the Western Agreement thereto annexed constitute newly discovered evidence relevant and important to the issues herein."

As to the first ground, the debtor's increased assets, improved financial condition and earnings, this is referred to in this brief, *infra*, page 57 .

The second ground consists of two parts: (a) The Government's suit constitutes a new development; and (b) the facts revealed by the complaint and the exhibit annexed thereto constitute newly discovered evidence.

Of these two aspects of the second ground, the Court omits any discussion of the first. It passes only upon the second, holding that the petitioner "had knowledge which would have enabled him to present to the Interstate Commerce Commission, during these proceedings before it, any matters now suggested by this Anti-Trust complaint," and that therefore the matter set forth was not newly discovered evidence (R. 5573).

The motion papers show that petitioner did not have such knowledge.

When, as a director of debtor, petitioner voted for the Western Agreement, he did so upon the representation as to its contents made by Hale Holden, Chairman of Southern Pacific Company. Petitioner had been assured by Holden when he became Chairman of Southern Pacific in July 1932, that he intended to treat debtor fairly (R. 870). Mr. Holden's remarks, at the meeting at which the Agreement was adopted, with respect to the "amicable settlements of differences" (R. 5536) between carriers were taken by petitioner to mean that the purpose of the Western Agreement was to devise arbitration machinery

to avoid the vexations of litigation and to formulate legitimate rules in respect to matters of general railroad practice (R. 5536-5539).

It may be asked, if petitioner had knowledge of the Western Agreement, why he waited until after the Government had instituted suit in August 1944 to use the facts revealed by the Western Agreement in his repeated endeavors to assert the rights and protect the interests of debtor and its security holders.

In March 1934 petitioner brought suit for the benefit of debtor, joining as defendants the Kansas City Southern, Missouri-Kansas-Texas and certain directors of these roads, Southern Pacific, its bankers Kuhn, Loeb & Company, and two of Southern Pacific's directors, deForest and Holden (R. 1011-1013). As appears from the opinions of the District Court and of the Circuit Court of Appeals in that case, no allegation of the bill of complaint was based on the Western Agreement (*Meyer* v. *Kansas City Southern*, 11 F. Supp. 937; aff'd 84 F. (2d) 411, 2d Cir.; cert. denied 299 U. S. 607).

Petitioner did not refer to the Western Agreement in support of his charges of misfeasance in the petition or in the amended petition for investigation in 1937 (R. 339-351, 357-467), or in the hearings before the Commission in 1937 and 1939, or in the District Court hearings in 1942. The fact that petitioner, upon the representation of Holden as to the contents of the Agreement, voted for the Agreement and for deForest, whom he regarded as hostile to debtor, to represent debtor in connection with the carrying out of the Agreement is the best circumstantial proof that petitioner believed that the Agreement was of an entirely innocuous nature.

The Court, in denying the motion, disregarded the principle laid down by the Supreme Court that in reorganization proceedings every important determination by

the court calls for an informed, independent judgment, and that the reorganization court is in a different position from that which it occupies in ordinary litigation where issues are to be determined solely upon such evidence as the contending parties choose to introduce (*Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, 520, 526; *First National Bank* v. *Flershem,* 290 U. S. 504, 525; *National Surety Co.* v. *Coriell,* 280 U. S. 426, 436).

In the suit by the United States under the Sherman Antitrust Act against The American Association of Railroads and others, as petitioner is informed, it has been agreed that counsel for both the Government and the defendants will meet with the Court on January 16, 1947, for the purpose of recommending that the Government be allowed to start putting in its case on April 1, 1947, under a shortened trial technique.

If the Government by a successful termination of the suit, either by trial or by consent decree, breaks up the illegal combination in violation of the antitrust laws, railroads other than Southern Pacific will no longer slow up their traffic routes to accommodate the more circuitous routes of Southern Pacific. Among these circuitous routes is the route maintained jointly by Southern Pacific and the debtor for perishable traffic originating west of El Paso, which traffic is carried by debtor at a heavy loss (R. 3332-46, 5366-74).

Even more important to debtor, Southern Pacific will no longer be under an inducement to solicit traffic for other railroads as a reward for their retardation of deliveries of traffic moving via their routes capable of more expeditious service. This Southern Pacific has done at the expense of its own system long haul, including debtor (R. 5337-51).

Nor will Southern Pacific then be under an inducement to fail to take steps through a lease, and through one-

line solicitation in connection therewith, to obtain greatly increased traffic for debtor (R. 5351-58).

The moving papers show that the Government's suit is of a meritorious nature and that a successful conclusion of that suit will result in adding greatly to debtor's earnings. Even assuming that petitioner had previous knowledge of the Western Agreement and its significance, the many thousands of debtor's security holders should not be made to suffer on that account. The motion should have been granted.

POINT IV

The Circuit Court of Appeals erred in holding that it was within the discretion of Judge Moore to deny petitioner's motion for new hearings.

That a new trial is necessary upon the death or disability of a judge who presided at the trial is a fundamental principle of the common law. *Smith* v. *State of New York,* 214 N. Y. 140, 143-144, Judge Cardozo writing.

In the state courts the following cases, among many others, have applied or recognized the rule: *Guardianship of Sullivan,* 143 Cal. 462, 467; *Wainwright* v. *P. H. & F. M. Roots Co.,* 176 Ind. 682, 698; *Worden* v. *Alexander, et al.,* 108 Mont. 208, 211; *Covaleski* v. *Thomas,* 229 App. Div. (N. Y.) 413, 414; *Company A, First Regiment* v. *State,* 55 N. D. 897, 904; *Commonwealth* v. *Thompson,* 328 Pa. 27, 28-29; *Com. of Pa.* v. *Claney,* 113 Pa. Super. 439, 442, 444. See also *Coleshill* v. *Manchester Corporation* [1928], 1 K. B. 776, 786.

The question presented by the holding of the Circuit Court of Appeals has never been directly passed upon by the Supreme Court.

In *Malony* v. *Adsit,* 175 U. S. 281, it was held that no bill of exceptions could be deemed sufficiently authenticated under Section 953 of the Revised Statutes unless signed by the judge who sat at the trial or by the presiding judge if more than one sat. The Court held that allowing and signing a bill of exceptions was a judicial act which could only be performed by the judge who sat at the trial, stating (p. 284):

> "* * * What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge."

Shortly after the decision in *Malony* v. *Adsit* the statute was amended so as to permit another judge to hear and pass on a motion for a new trial and to allow and sign a bill of exceptions if the judge before whom the case was tried was "by reason of death, sickness, or other disability" unable to do so. (Act of June 5, 1900, ch. 717, 31 Stat. 270, 28 U. S. C. A. 776.)

The amendment was strictly construed. *Western Dredging & Improvement Co.* v. *Heldmaier* (7th Cir.), 111 F. 123; *Walton* v. *Southern Pac. Co.* (9th Cir.), 53 F. (2d) 63; *Ulmer* v. *United States* (2d Cir.), 266 F. 176.

Rule 63 of the Federal Rules of Civil Procedure has now superseded Section 776 (28 U. S. C. A. 776). It reads:

> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or

findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

The only decisions dealing with Rule 63 are two cases in the District Court, *Ten-O-Win Amusement Co.* v. *Casino Theatre* (D. C. Cal. 1942), 2 F. R. D. 242, and *Burrill* v. *Shaughnessy* (D. C., N. D. N. Y., 1946), F. R. Svc. 63.2. In the *Ten-O-Win* case proposed findings and conclusions were unsigned. The successor judge refused to sign them. In the *Burrill* case questions of law were submitted to the trial judge after issues of fact had been determined by the verdict of a jury. He died before rendering a decision. His successor held that he had no power to decide these questions without a retrial.

There are a number of other decisions in the Federal courts on the power of a successor judge to act after the death of the presiding judge. None of these decisions, however, presents facts similar to those in the instant case.

In a very early case, *In re The Life and Fire Ins. Co. of N. Y.* v. *The Heirs of Wilson,* 8 Pet. 291, judgment was rendered and thereafter the judge died. The Supreme Court, citing a statute of Louisiana of 1805 which followed the Spanish law, held that the docketing and signing of the judgment were purely ministerial acts, and that it was not required by the Louisiana statute that the judge who rendered the decision should sign it.

In *Guardian Assur. Co.* v. *Quintana,* 227 U. S. 100, it was held that after verdict had been rendered and the presiding judge passed way, a successor judge could sign the bill of exceptions.

In *Meldrum* v. *United States* (9th Cir.), 151 F. 177; *King* v. *United States* (6th Cir.), 25 F. (2d) 242, and *Missouri State Life Ins. Co.* v. *Langreder* (7th Cir.), 87 F. (2d) 586, it was held that the successor judge had power to act after verdict or after the filing of findings of fact and conclusions of law.

The right to a new trial upon the death or disability of a judge may be waived by stipulation or by conduct that amounts to acquiescence or consent. *Simons* v. *United States* (9th Cir.), 119 F. (2d) 439; *Freeman* v. *United States* (2d Cir.), 227 F. 732; *Thomas-Bonner* v. *Hooven, Owens & Rentschler Co.* (6th Cir.), 284 F. 386.

In *Cahill* v. *Mayflower Bus Lines* (2d Cir.), 77 F. (2d) 838, there was no dispute as to the facts. The only matter that the successor judge had to decide was whether a certain paper constituted sufficient notice.

A judge who merely reads the record is not in as advantageous a position as the trial judge. There are matters transpiring at a trial which do not appear on the record. The trial judge has an opportunity to observe the demeanor of witnesses. He asks questions of counsel and witnesses to inform himself.

Judge Moore was conscious of the difficulties under which he labored as a successor judge (R. 5565). Yet he refused to grant a new trial.

In a case involving the interests of many thousands of security holders, in which there are issues as to the control exercised over debtor in breach of fiduciary obligations and in violations of the antitrust laws, and where the witnesses were hostile, as in the instant case, it was of particular importance that the right to a new trial upon the death of the presiding judge should be safeguarded.

POINT V

The record of earnings of debtor, its increase in assets and in net current assets, and reduction in indebtedness, require a new plan.

In *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 540, and in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526, the Supreme Court dwells upon the importance of earning power in formulating a plan of reorganization.

In 1941 debtor's earnings in net income over and above interest charges amounted to $4,472,048 (R. 5257). The plan was to be effective as of January 1, 1942.

For the following years debtor's net income was as follows: 1942, $5,673,577; 1943, $7,543,273; 1944, $8,119,085 (R. 5257). For the first nine months of 1945 debtor earned in net income $6,507,850. Due to accelerated amortization of defense projects during the last three months, net income for the year amounted to $3,993,006. For the first eleven months of 1946 debtor earned in net income $4,044,435.

Per share of common stock,—which the Commission has held to be valueless,—earnings were as follows: 1941, $20.23; 1942, $27.23; 1943, $38.10; 1944, $41.45; 1945, $17.45; and for the first eleven months of 1946, $18.23 (Moody's Railroads).

Statistics of total operating revenues show that debtor was making better progress in recovering from the depression than other Southwestern railroads, and also as compared with Class I railroads of the country as a whole.

For the three years 1929, 1930 and 1931, the average total operating revenues of debtor, Missouri-Kansas-Texas, St. Louis-San Francisco, Missouri Pacific and Kansas City Southern were as follows (R. 5331):

St. L. S. W.	*M-K-T*	*Frisco*	*Mo. Pac.*	*K. C. S.*
$21,920,433	$45,452,226	$73,477,017	$118,421,266	$18,493,765

Using these respective averages as standards of comparison, for the years 1943 and 1944 total operating revenues of these roads increased in the following percentages (R. 5332, 5544):

	St. L. S. W.	*M-K-T*	*Frisco*	*Mo. Pac.*	*K. C. S.*
1943	193.69	73.86	53.74	92.36	133.70
1944	231.14	84.86	65.01	99.76	139.94

Other comparative figures of operating revenues and of earnings are equally impressive (R. 5330-35; 5544-46).

The superior showing made by the debtor was due in part to the advantageous position it is in to serve the Southern Pacific System, and despite the failure of Southern Pacific to solicit preferentially for debtor (R. 5335).

In 1937 officials of debtor forecast that by 1940 debtor would earn its entire interest charges (R. 221). Income available for fixed charges was estimated at $3,505,000 for 1940, and $4,142,000 for 1941. Interest charges for those years were: 1940, $3,108,980; and 1941, $3,023,893 (R. 5329). The extraordinary earnings during the war period should not be allowed to obscure the fact that in 1937 the management of the debtor was of the opinion, that, assuming normal conditions, debtor would earn in excess of interest charges almost $400,000 in 1940 and $1,000,000 in 1941.

In 1936, the first year of reorganization, when its total operating revenues were $19,363,508, debtor earned 98½% of all its interest charges (R. 5329). For the first eleven months of 1946 total operating revenues were $42,376,393; its net income $4,044,435 (Moody's Railroads)

The Circuit Court of Appeals, referring to debtor's fine record of earnings, states that the "sole cause of

these enormous increases is, for most part if not entirely, the war" (R. 5657). Obviously the war was the cause of a great part of the increase. But the Court erred in disregarding the proof in the record that despite Southern Pacific's failure to carry out its obligations, debtor during the prewar period, as well as during the war has shown a more rapid growth than other railroads, and continues to show large earnings. It must be assumed that the rate of progress shown during the prewar period would have been continued in the absence of abnormal conditions.

The following figures taken from the Annual Reports of debtor show the investment in road and equipment during the years 1942 to 1945, inclusive:

ROAD

	Gross Charges	*Retirements*	*Net*
1942	$1,195,372	$651,161	$544,211
1943	2,274,160	467,984	1,806,176
1944	2,032,801	305,243	1,727,558
1945	2,994,739	1,112,735	1,882,004

EQUIPMENT

	Gross Charges	*Retirements*	*Net*
1942	$1,998,865	$238,175	$1,760,690
1943	622,118	235,545	386,574
1944	2,799,537	309,265	2,490,272
1945	2,531,394	561,631	1,969,763

Total gross expenditures for the four years since the date the plan was to become effective under "Road" amounted to $8,497,072, and under "Equipment" to $7,951,914. After retirements, the net additions and betterments to Road for these years amounted to $5,959,949, and to Equipment $6,607,299.

To the extent that these expenditures contribute to the more efficient and economical operation of the property, it is submitted that they make for increased earnings.

Net current assets as of January 1, 1942, were $2,352,344 (R. 5259, 5261). Net current assets as of October 31, 1946 were $22,090,504 (Dist. Ct. Pr. R. 10578-79), an increase of $19,738,160.

Since January 1, 1942, there has been paid in full the following indebtedness: Equipment Trust Notes, Series K, $216,000; Texarkana Union Station 5% Certificates, $315,000, and Railroad Credit Corporation loan, $1,318,076 (Dist. Ct. Pr. R. 9799, 10429, 10471). There has also been paid on account of the principal of the Stephenville North & South Texas 5% bonds the sum of $76,785 (Annual Reports). There has thus been a reduction in principal since January 1, 1942, of $1,925,861.

Accrued interest as of January 1, 1942, amounted to $14,378,637 (R. 3785). The following table shows that since that date there has been a reduction in accrued interest of $8,281,959.

	Principal Indebtedness Jan. 1, 1942[1]	Accrued Interest Unpaid Jan. 1, 1942[1]	Int. from Jan. 1, 1942, to Jan. 1, 1947	Total Int. as of Jan. 1, 1947	Interest Paid[2]	Interest Unpaid Jan. 1, 1947	Reduction in Acc. Int. Since Jan. 1, 1942
2d Mtge. 4% Certificates.....	$3,042,500	$ 669,350	$ 608,500	$1,277,850	$1,217,000	$ 60,850	$ 608,500
First Terminal & Unifying 5's	8,063,000	2,620,475	2,015,750	4,636,225	4,434,650	201,575	2,418,900
General & Refunding 5's.....	9,327,500	3,031,438	2,331,875	5,363,313	3,264,625	2,098,688	932,750
Stephenville 5's	2,318,448[3]	775,495	563,295	1,338,790	.....	1,338,790	*563,295*
Central Arkansas & Eastern 5's	932,232	335,120	233,058	568,178	.....	568,178	*233,058*
Chase National Bank[4]	3,500,000	1,057,591	875,000	1,932,591	1,742,125	190,466	867,125
Mississippi Valley Trust Co.[5] ..	1,000,000	302,169	250,000	552,169	497,525	54,644	247,525
Southern Pacific Co.[6]	17,882,250	5,573,775	4,470,563	10,044,338	8,460,850	1,583,488	3,990,288
Railroad Credit Corp.[7] ..... (Jan. 31, 1941)	1,318,076	13,224	.....	.....	.....	.....	13,224
						$6,096,679	$8,281,959

[1] Figures for first two columns from R. 3785.

[2] Figures for this column (except Railroad Credit Corporation) computed from R. 5706 *et seq.*

[3] On October 1, 1942, $76,785 was paid, leaving a balance of $2,241,663 (Annual Reports).

[4] Chase National Bank holds as collateral $4,921,500 General & Refunding and $98,000 Southern Illinois & Missouri Bridge Co. bonds. Accrued interest paid on the General & Refunding bonds amounted to $1,722,525. Interest paid on the Bridge Co. bonds amounted to $19,600, a total of $1,742,125.

[5] Mississippi Valley Trust Company holds as collateral $1,405,500 General & Refunding bonds and $28,000 Bridge Co. bonds. Accrued interest on the General & Refunding bonds amounted to $491,925, interest on the Bridge Co. bonds $5,600, a total of $497,525.

[6] Southern Pacific Company holds as collateral $23,903,000 General & Refunding bonds and $474,000 Bridge Co. bonds. Accrued interest on the General & Refunding bonds amounted to $8,365,050, interest on the Bridge Co. bonds $94,800, a total of $8,460,850.

[7] Principal and interest on the Railroad Credit Corporation loan have been paid (District Ct. Printed Record p. 10471).

Total reduction in principal and accrued interest amounts to $10,207,820. The plan fails to provide for indebtedness to the extent of $8,243,764 (R. 3782). The reduction in principal and accrued interest alone is thus $1,964,056 in excess of such indebtedness.

Of the $22,090,504 of net current assets, $17,000,000 could readily be used to make further reductions in debt. The bond issues and loans which could be paid off bear interest at the rate of 5% with the exception of the Second Mortgage 4% bonds. If the $17,000,000 were so used, there would be a reduction of interest charges in the amount of $818,575. The large amount of cash in debtor's treasury, viewed from this standpoint, carries with it an annual increase in net income of over $800,000 per annum.

Debtor's principal indebtedness as of January 1, 1942, amounted to $68,865,006, and with accrued interest to $83,243,643 (R. 3785). If present indebtedness were reduced by $17,000,000, this would make a total reduction from the January 1, 1942, figure of $27,207,820, or 32.7%.

Other developments that the Commission was not in a position to anticipate at the time of the formulation of the plan and which will make for a large net income are: (1) the recent increase in freight rates of 17.6% granted by the Commission; (2) the high level of productivity of the country as a whole, both in dollar value and in units of production; and (3) the assurance that low interest rates are to continue, thus enabling the railroads to refinance on an advantageous basis.

The territory served by Southern Pacific System includes the states of Louisiana, Texas, California, New Mexico and Arizona, which during the years 1930 to 1940, and since then, have shown a growth greater than other regions. In view of the strategic position of debtor to serve other parts of Southern Pacific System, any growth

in population and progress in the development of the territory served should be reflected in an accentuated form in freight revenues of the debtor.

The Supreme Court in the *Denver & Rio Grande* case held that the changed conditions under the circumstances of that case did not require a new plan. The plan was dated June 1943. The earnings of the Company for the following years were: 1941, *d* $2,301,914; 1942, $11,306,966; 1943, $5,907,760; 1944, $2,505,572; 1945, *d* $7,139,492; 1946, to November 30, *d* $2,422,014 (Moody's Railroads).

As the Supreme Court pointed out, the best year that the Denver & Rio Grande had was the year preceding the formulation of the plan.

In the instant case, debtor's earnings, after the formulation of the plan in March, 1942, and during each of the war years, were substantially greater than they were during the year 1941. During the postwar period earnings have been excellent.

In this and other ways, the facts in the case of debtor are very different from those in the *Denver & Rio Grande* case.

In determining that the plan eliminating the stockholders of debtor was not arbitrary, the Circuit Court of Appeals discusses two matters (R. 5669). In connection with the first,—that junior indebtedness in the amount of $8,304,118 was unprovided for,—regard should be had to the fact that principal and accrued interest has been reduced since January 1, 1942, in excess of that amount and there is now a large sum available for further reduction of debts.

The second matter was that in the opinion of the Court the indebtedness to Southern Pacific Company and the banks was greater by $11,901,130 than the total of the respective claims, being the difference between the face value of the claims with interest and the par value of the col-

lateral with interest given as security. The Court states (R. 5670): "The participation in the Plan allowed these three creditors seems to be based on the value of pledged security rather than face of loans plus accrued interest."

In holding that the loans were undervalued, the Court referred to *In re Chicago & N. W. Ry. Co.*, 7 Cir., 126 F. (2d) 351, cer. den. 318 U. S. 793, and *In re New York, New Haven & Hartford R. Co.*, 2 Cir., 147 F. (2d) 40, 47-48, cer. den. 325 U. S. 884.

The cases cited do not support the Court's theory that there has been an undervaluation of the indebtedness to Southern Pacific and the banks.

In the *New Haven* case, *supra*, it was held that the banks were entitled to be treated "as secured creditors to the extent to which they could have realized on their collateral had they not been restrained from selling, and as unsecured creditors only for the amount by which the debts owing them exceed such realizable value of the collateral" (p. 48).

In *In re Chicago & N. W. Ry. Co., supra*, the Court held that in view of the fact that the Reconstruction Finance Corporation held collateral through a sale of which it could have realized the full amount of its claim, this was a circumstance to be taken into consideration in determining whether in the plan of reorganization the R.F.C. had been unduly favored (p. 369).

It is apparent from both of these cases that, insofar as claims are secured, their value as such is to be measured by the market value of the collateral at the time of the filing of the petition for reorganization.

On December 12, 1935, an injunction was issued restraining the creditors of debtor from selling or otherwise disposing of the collateral held by them respectively (R. 57).

The General & Refunding 5's during the period December 12 to December 27, 1935, sold at a high-low of 28½-23½

(R. 233). Southern Illinois & Missouri Bridge Company bonds sold at a high for 1935 of 74½ (R. 235). On the basis of 28½ for the General & Refunding 5's and 74½ for the Bridge Company bonds, the total value of the collateral held by Southern Pacific Company on December 12, 1935 was $7,165,485.

If the measure of a secured claim is the market price of the collateral, then Southern Pacific, for example, was entitled to be treated as a secured creditor only to the extent of $7,165,485 of its claim of $17,882,250.

In view of the *New Haven* and *Chicago & N. W.* cases, the Court erred in holding that the claims of Southern Pacific and the banks had been undervalued to the extent of $11,901,130.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted.

Dated: New York, January 17, 1947.

WALTER E. MEYER,
Petitioner, *Pro Se,*
And as Attorney for other Stockholders.

R. WALSTON CHUBB,
Attorney for Petitioner.

Appendix

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U. S. C. A. 205) are as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; * * *

* * * * *

"(c) After approving the petition:

* * * * * *

"(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mis-

management, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

* * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, * * * After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

* * * * *

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the

plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; * * *

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. * * * If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no

value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, * * * *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. * * *

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 909

WALTER E. MEYER, Intervener,

Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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February 28, 1947.

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In the

Supreme Court of the United States

October Term, 1946.

No. 909

Walter E. Meyer, Intervener,

Petitioner,

v.

Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is in reply to the briefs in opposition of respondents Southern Pacific Company, a large creditor and controlling stockholder of debtor; Guaranty Trust Company of New York, Trustee under the debtor's First Terminal and Unifying Mortgage; the Protective Committee for the holders of the debtor's First Terminal and Unifying Mortgage bonds; Chemical Bank & Trust Company, as Successor Trustee under the debtor's General and Refunding Mortgage; and The Chase National Bank of the City of New York and Mississippi Valley Trust Company, creditors.

In Reply to Southern Pacific's Brief:

As to Southern Pacific's discussion of Point I of petitioner's brief:

Chief among the reasons relied on by petitioner for the allowance of a writ is that in disregard of the opinion of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 478, 479, 514, and other cases, the District Court failed to make a review and the Circuit Court of Appeals failed to make an independent review (a) of the proof in the record of the illegal impairment of earnings of the debtor during the period which the Commission took on which it made its estimate of prospective earnings for the purpose of determining the capitalization of the debtor in its plan of reorganization (Petition, p. 19, par. 2), and (b) of the proof which required that in the plan Southern Pacific's claim as creditor and stockholder be expunged or subordinated (p. 20, par. 3). (Brief, pp. 26-36)

Southern Pacific argues that the first of these reasons involves a matter of valuation and that this Court has taken the position that "valuation matters are primarily for the Commission and that the judicial function of review does not extend to weighing the evidence but only to ascertaining whether the Commission's findings are supported by substantial evidence, and whether it has followed proper legal standards" (S. P. Brief, p. 26). In support Southern Pacific quotes the language of the opinion in the *Western Pacific* case at pages 472-473, in which this Court discusses the review required in the ordinary or simple case of valuation where no "legal objection" has been raised to the use by the Commission of its own valuation.

Southern Pacific omits all reference to that part of the opinion which holds that where claimants under a plan are being deprived of their entire equity "a wider scope

of review" is necessary "than an inquiry as to whether statutory standards for valuation have been followed" (p. 478), and to the language that follows from which it appears that there must be review to determine whether there is "legal objection" to the Commission's use of its own valuation. This Court there states (p. 479):

> "The court properly affirms the Commission, when it finds *no legal objection* to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization. For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require *an independent examination and an affirmation by the court.*"*

In further disregard of the holding of this Court in the *Western Pacific* case, Southern Pacific cites (p. 32) a line of cases prior to that decision, to the effect that "virtually the only place where findings of fact of an administrative body will receive an independent judicial review is in the narrow field where the facts are 'constitutional facts'." Clearly the cases cited are not applicable to a Section 77 proceeding involving a determination of the respective functions of the Interstate Commerce Commission and the courts.

Southern Pacific claims that the statement of petitioner in his brief (p. 32), that the evidence introduced before the District Court was not considered by either the District Court or the Circuit Court, is without foundation (S. P. Brief, pp. 33-34). In support thereof reference is made to a statement in the opinion of the District Court (R. 5202) that: "He [petitioner] has not convinced either this Court or the Commission that his charges are well-founded."

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* Emphasis supplied.

The District Court held (R. 5203):

> "The question of the feasibility of a lease is, of course, a matter within the exclusive jurisdiction of the *I. C. C.* (49 U. S. C. 5). This, as well as a determination of the validity of Meyer's charges of bad faith are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the *Commission* has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the *Commission* on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."*

The proof introduced in the District Court in support of petitioner's charges was of a similar nature to that introduced in the hearings before the Commission. In view of the holding that the validity of petitioner's "charges of bad faith" was a matter requiring study by experts and of the entire opinion of the District Court, which clearly indicates that it made no review of the proof in the record, it cannot be seriously claimed that the proof introduced either in the hearings before the Commission or before Judge Davis was reviewed by Judge Moore, Judge Davis' successor. The remarkable situation is thus presented that in these reorganization proceedings the important proof introduced in the hearings before Judge Davis has not been reviewed by the Commission or the District Court, or indeed, as has been brought out, by the Circuit Court of Appeals.

Southern Pacific contends (p. 34) that because Judge Davis ruled that "the testimony before him would be re-

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* Emphasis supplied.

stricted to the period occurring subsequent to the consideration of the plan by the Commission (R. 4186)," and because the Circuit Court of Appeals stated that "considerable documentary evidence relating to the period prior to that time was introduced" (R. 5569), that such evidence was introduced in violation of the Court's order, which petitioner did not attack, and therefore the said documentary evidence "could properly be disregarded."

A glance at the index to the printed record shows that with but very little exception the documentary proof as to events preceding the date of the close of the hearings was limited to certain proof marked for identification Exhibits 10 to 15, selected letters from which are included at pages 4993 to 5116 of the record. The Court ruled against the admission of these exhibits, to which petitioner formally excepted. At the time the Court stated: "* * * exceptions are saved as a matter of course, and you need not expressly do it." (R. 4203-4205)

A very limited use was made of this proof in petitioner's briefs to the District Court and to the Circuit Court of Appeals, inasmuch as he was not allowed to examine the traffic officials of Southern Pacific or debtor on the matters treated. If Judge Davis, as the proceedings progressed, chose in certain instances to admit documentary evidence of matters which were explanatory of and supplementary to the main items of proof placed in the record as to events that took place after the close of the hearings before the Commission, this was entirely within his discretion.

Southern Pacific claims (p. 35) that because "it has been held time and again that the rights of creditors are fixed, both as to the bankrupt and between themselves, as of the date of the filing of the petition in bankruptcy," on that account no proof of developments subsequent to such date may be considered on the issue of expunging its

claim.* In support of its position in this respect the following cases are cited: *United States* v. *Marxen,* 307 U. S. 200, 207; *Sexton* v. *Dreyfus,* 219 U. S. 339, 344; *White* v. *Stump,* 266 U. S. 310, 313. These cases are all cases of liquidating bankruptcies. Southern Pacific cites no cases in railroad or corporate reorganization proceedings.

The definitions of "provable claims" and "creditors" are very much broader in Section 77 than in ordinary bankruptcy. Subsection (b) of Section 77 states: "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease."

This Court gave consideration to the above language in *Connecticut Ry. Co.* v. *Palmer,* 305 U. S. 493, where it held that upon the rejection of a lease in a Section 77 proceeding the measure of damage was the actual damage determinable in equity proceedings and that the Act fixed no time limit to the amount.

In many ways a railroad reorganization proceeding may be regarded as a substitute for reorganization through equity receivership.

In an equity receivership, for example, a claim whether past due, immature or contingent, is provable of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estate. *Dickinson* v. *Uni-*

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* It came out in the hearings before Judge Davis that the files of Southern Pacific's subsidiary, Texas & New Orleans, up to and including the year 1934, bearing on its relations with the debtor, had been destroyed in November or December, 1940 (Testimony of F. L. Gordon, Traffic Manager of Texas & New Orleans, R. 4311-16).

versal Service Stations, 100 F. (2d) 753, 757; *Wake Development Co.* v. *Auburn-Fuller Co.,* 71 F. (2d) 702.

Even if it were held that these precedents in liquidating bankruptcy proceedings are applicable in a Section 77 proceeding, proof as to breaches by Southern Pacific Company of its obligations to debtor after 1935 is relevant to a consideration of such breaches of obligation previous to the filing of the petition for reorganization.

There is, however, abundant proof in the record as to Southern Pacific's wrongful and illegal acts in its relations with debtor during the period 1925 to 1935 and previous to the filing of the petition, which call for the expunging or subordination of the claim.

Southern Pacific contends (p. 35) that it "has never denied its legal duty to Debtor and its minority stockholders under such cases as *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307."

The fact is to the contrary. In Southern Pacific's brief submitted to the Commission on June 3, 1940, after the close of the hearings, there is the following point heading (p. 107):

> "With a 13% Minority Stock Interest Outstanding, St. Louis Southwestern Has Been Independently Operated, Without Interference or Domination By Southern Pacific."

In the discussion under this head Southern Pacific states:

> "The Southern Pacific or its subsidiary, Texas & New Orleans Railroad Company, or any of their directors, officers or employes, has not interfered with or undertaken to control in any respect the management or operation of St. Louis Southwestern Railway, including its management, traffic, maintenance, and operation policies or methods because of

> the influence of Kuhn, Loeb & Company, or for any other reason, real or imaginary. The St. Louis Southwestern System has been managed and operated as an independent carrier in its own best interests. Officers and directors of the Southern Pacific, who have functioned as officers and directors of the St. Louis Southwestern, have functioned in the performance of their duties as St. Louis Southwestern officials and not as Southern Pacific officials."

Petitioner answered these contentions in his brief submitted to the Commission in April 1940 (R. 3375-81). In this absurd contention that it did not control debtor after it had made application under Section 5, paragraph (2) of the Act and had been authorized by the Commission to acquire a majority stock interest in debtor, Southern Pacific received the Commission's support. The Commission in its report held that Southern Pacific did its full duty to the debtor in giving it an independent board of directors (R. 3669).*

In further contravention of petitioner's argument that he was entitled to an independent judicial review of the proof in the record on which he based his contention that

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* On December 12, 1935, the date of the filing of the petition for reorganization of debtor, the members of its board of directors, the respective positions held by them and the amount of stock owned were as follows: Hale Holden, Chairman of Southern Pacific Company, 100 shares common; A. D. McDonald, President of Southern Pacific, 100 shares common; Paul Shoup, Vice-Chairman of Southern Pacific, 100 shares common; Ben C. Dey, general counsel for Southern Pacific, 100 common; Daniel Upthegrove, President of debtor, 100 shares common; Frank M. Gould, Vice-President of debtor, 100 shares preferred; Paul J. Longua, Secretary of debtor, 10 shares preferred; Alfred H. Swayne, 100 shares common; W. W. Cumberland, none (R. 1051; 3375-3376). It thus appears that seven of the nine directors were either officials of Southern Pacific or of debtor. Obviously the tenure of office of the three officials of debtor who served as directors was dependent upon their not incurring the ill-will of the majority control. Mr. Dey, testifying as a witness, admitted that the stock held by some of the directors was perhaps owned by Southern Pacific Company (R. 2410).

Southern Pacific's claim should be expunged or at least subordinated, Southern Pacific (p. 28) points to the fact that objections to its claim against debtor were filed by certain foreign bondholders and that these objections "had been overruled by the Court after extensive hearing and the claim allowed." Southern Pacific continues (p. 28):

> "The attack upon Respondent's claim by the foreign bondholders was similar to that made by Petitioner, since they charged that the claim should be expunged or subordinated because of alleged mismanagement of Debtor by Respondent (R. 3982, 3996, 3998)."

The Special Master's report shows that the foreign bondholders alleged (1) that the claimant, Southern Pacific, so dominated and controlled the debtor that its proof of claim against its subsidiary was in fact a claim against itself and should be disallowed as a legal fraud upon minority stockholders and creditors; and (2) that Southern Pacific "should have assisted debtor in the spring of 1935 by agreeing with the Reconstruction Finance Corporation to let its collateral, pledged to secure its individual loan, stand as security for a new loan to pay off existing bank indebtedness of Debtor at sixty-five cents on the dollar" (R. 3992, 3993).

In referring to these hearings and to the report of the Special Master, the District Court held: "* * * it does not appear that the issues raised by the objections are co-extensive with those raised by Meyer in his objections to the plan" (R. 5199).

Petitioner's charges against Southern Pacific embodied in his objections and claims for equitable treatment are very different from the somewhat technical and limited objections of the foreign bondholders.

Petitioner did not contend that Southern Pacific's claim against debtor was a claim against itself. He asked un-

der paragraph (3) of his objections that Southern Pacific's claim as a creditor and stockholder be expunged or at least subordinated because "Southern Pacific has both violated its legal obligations to debtor, by which the debtor has been greatly damaged, and has acted unconscionably in failing to take measures by which the earnings of the debtor would have been greatly increased." Under paragraph (8) of the objections and paragraph (2) of the claims for equitable treatment, the grounds for asking for the subordination of Southern Pacific's claim are set forth in detail (R. 3842, 3844-46).

In *Lyon* v. *Perin & Gaff Mfg. Co.*, 125 U. S. 698, this Court held:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz.: (1) *Identity in the thing sued for;* (2) *identity of the cause of action;* (3) *identity of persons and parties to the action;* and (4) *identity of the quality in the persons* for or against whom the claim is made * * *."

In order to render a matter *res adjudicata*, there must be at least an identity of parties and of issues. *Myers* v. *International Trust Co.*, 263 U. S. 64, 71; *Bigelow* v. *Old Dominion C. Min. & S. Co.*, 225 U. S. 111, 126.

The principles of *res adjudicata* have been held to apply to the allowance of claims in bankruptcy proceedings. *Edward Hines Western Pine Co.* v. *First Nat. Bank*, 61 F. (2d) 503; *Massee & Felton Lumber Co.* v. *Benenson*, 23 F. (2d) 107. See also: *Gratiot County State Bank* v. *Johnson*, 249 U. S. 246; *Manson* v. *Williams*, 213 U. S. 453.

In the instant case there was no identity of parties, as petitioner did not appear or participate in the proceedings before the Special Master. Nor was there any identity in the cause of action. The findings of the Special Master bound only the foreign bondholders who protested the claim.

Because petitioner was of the opinion that the matter of the validity of Southern Pacific's claim was a matter to be first passed upon by the Commission, subject to review by the court, he did not deem it advisable to participate in the proceedings before Special Master Early.

Petitioner in December 1935, a few days after the filing of the petition for reorganization, called to the Commission's attention his charges against Southern Pacific (R. 393, 451). Petitioner endeavored but without success to introduce proof at the hearings before the Commission in 1937 in support of his charges (R. 430-431). Formal petitions reiterating these charges and requesting an investigation were filed respectively in April and June, 1937 (R. 339-351; 357-467). About 1200 security holders joined in the petitions for investigation (R. 3840). The reorganization proceedings were reopened in 1939 (R. 500). At the reopened hearings petitioner placed much proof in the record in support of his charges (R. 529 *et seq.*). He asked the Commission to make an investigation, if, indeed, in view of the strength of such proof, an investigation was necessary (R. 3443).

The objections of the foreign bondholders to Southern Pacific's claim were filed on July 15, 1937 (R. 3982). The hearings thereon were held on November 14, 1938 (R. 3985), and during a period when petitioner was awaiting a decision by the Commission on the petitions for investigation.

To hold that by proceedings in the District Court upon objections to a claim, the Commission can be deprived, in connection with its formulation of a plan of reorganization, of the right of determining in the first instance and subject to review by the court, a controversy over the priority or validity of claims would be to deprive the Commission to that extent of the important function given it under the statute of formulating the plan of reorganization.

Here Southern Pacific argues on the one hand that a determination of the Commission is not subject to an independent review by the court and points to the "complicated and technical transportation problems requiring judicial abnegation in order to give free play to the Commission's expertise" (S. P. Brief, p. 32). In the same brief it stoutly argues that the District Court through confirming the report of its Special Master could preclude the Commission in formulating its plan from passing upon the validity or priority of a claim.

Petitioner stated in his brief in support of his petition (p. 34) that any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the issue of whether debtor's earnings were illegally impaired, and the issue as to whether the claim of Southern Pacific should be expunged or at least subordinated, was purely academic for the reason that all of the proof relevant to the one issue was relevant to the other.

This statement has evidently been misunderstood by Southern Pacific.

By way of further explanation, petitioner took the position (pp. 19-20, 34) that an independent review is necessary both as to illegal impairment of earnings and as to the priority and validity of Southern Pacific's claim.

In the *Western Pacific* case, as has been shown, this Court expressly held that in "controversies over the priority or the validity of claims" "an independent examination and an affirmation by the court" was required. It was also stated in the sentence immediately preceding this, that the court properly affirmed the Commission "when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization" (p. 479). This, too, would require an independent examination and affirmation though the language is not as

explicit as in the case of a controversy over the priority or validity of claims.

Petitioner reasoned: The Court explicitly states that an independent examination and affirmation is necessary to determine the priority or validity of claims. In view of this clear statement and the finding of the Commission, quoted at page 34 of petitioner's brief, to the effect that the proof in the record as to the first issue was the same as the proof in the record as to the second issue, further discussion would be academic as to whether an independent review was necessary in order to determine whether there was legal objection to the Commission's use of its own valuation. The clear necessity of an independent examination and review of the priority or validity of Southern Pacific's claim, proof for the two issues being identical, dispensed with the necessity of considering whether the review to determine whether there was legal objection to the Commission's use of its own valuation was of a more limited nature.

According to Southern Pacific, however, the lesser includes the greater. Southern Pacific argues that if it is only necessary to determine whether there was substantial evidence to support the Commission's valuation, it is only necessary to determine whether there was substantial evidence to support the Commission's findings as to the priority or validity of the claim.

And finally, Southern Pacific argues that: "It is evident that Petitioner's real aim is to have this Court reconsider in minute detail the great volume of conflicting evidence * * *." "Such factual matters," Southern Pacific avers, "while of importance to Petitioner, are not of such general importance as to warrant review by this Court" (p. 35).

The proof as to the illegal impairment of the earnings of debtor and the proof which requires the expunging or, at least, the subordination of Southern Pacific's claim

stand out in clear and bold relief. The question as to the respective functions of Commission and court in reorganization proceedings where it becomes necessary to pass upon proof involving breaches of fiduciary, contractual and other obligations by a railroad in its control of a debtor railroad should be determined by this Court. The interests of thousands of security holders, not only in this case but in all reorganization proceedings, are involved.

As to Southern Pacific's discussion of Point II of petitioner's brief:

Under this point petitioner argued that both the Commission and the District Court had failed to make the thorough investigation necessary to assure control of debtor in the interest of debtor and of all of its security holders upon emergence from reorganization proceedings. Southern Pacific takes the position that the question of "whether the Commission should institute an investigation" "is an administrative one within its sole discretion and not subject to judicial review" (S. P. Brief, p. 36).

While the Commission is given power to investigate under Section 12 of the Interstate Commerce Act (49 U. S. C. 12), whether the Commission is under a duty to investigate under Section 77 involves an interpretation of the intent of Congress in enacting Section 77.

In proof of the fact that the Commission did investigate, Southern Pacific states that the Commission caused an investigation to be made of "Meyer's charges of alleged diversion of business from the Debtor by Kansas City Southern Railway Company and other southwestern carriers during the years 1927, 1928 and 1929" (p. 37).

This statement fails to bring out that the investigation referred to, while it took place in the years 1927 to 1929, covered the years 1924 to 1927. Only one of these years, 1927, was included in the period 1927 to 1941 taken by the Commission on which it based its estimate of debtor's prospective earnings. No investigation was made for the other years.

Southern Pacific is content to state that in the Boyd report[1] to the Commission the conclusion was reached that no proof of diversion of traffic had been found (S. P. Brief, p. 37). It fails to refer to or to directly controvert the statement made by petitioner in his petition (p. 5), that, contrary to the report of the Bureau of Inquiry of the Commission, the data for the years 1924 to 1927, compiled by Kansas City Southern, Missouri-Kansas-Texas and debtor at the request of the Bureau, proved incontrovertibly that traffic in large amounts had been diverted from debtor to the two other roads during the period 1925 to 1927. That this was so is a mere matter of mathematical computation from the statistical data in the record compiled by the three roads at the request of the Bureau (R. 1727-87; 3055-89; 3472-81; 3600-04; see also 5777-83).

Southern Pacific avers (p. 37) that petitioner was given access to the files of the debtor. Petitioner was unable to use on cross-examination the abundant documentary evidence (R. 2735-2976) which he obtained only subsequent to the adjournment of the hearings at which almost all of the witnesses testified.

In proof of the fairness of the Commission's report Southern Pacific (p. 38) refers to its length. If the length of a report of an administrative agency is to be taken as evidence of its correctness, reports of administrative agencies will continue to increase in length.[2]

In contrast to the majority report of the Commission herein, which covers 131 pages (R. 3547-3678), the dissenting opinion of Chairman Eastman consists of only 19 pages

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[1] The report was the report of the Bureau of Inquiry of the Interstate Commerce Commission. It was made in 1939 upon data obtained by its special agent Boyd ten years previously.

[2] The voluminous and obscure nature of the Interstate Commerce Commission's publications was criticized by the Senate Committee on Interstate Commerce in Senate Report 1170, on "Modification of Railroad Financial Structures" (p. 77), made in connection with S. 1253, 79th Cong., 2nd Sess.

of the printed record (R. 3713-3732). Within these limits Chairman Eastman, already then in failing health and without having presided at the hearings, taking time from his then important and pressing duties as Chairman of the Commission, gave a clearer idea of the vicissitudes suffered by debtor as a result of the wrongful and illegal control by other railroads than did the lengthy majority report.

In respect to petitioner's contention that the District Court made no investigation of his charges, Southern Pacific (p. 39) claims that he took no exceptions to the reports of the Trustee and made no motion in the District Court for any investigation by the Trustee. Petitioner is on record as to the failure on the part of the Trustee to cooperate with him in obtaining information as to the issues raised by his charges. Indeed, the Trustee placed impediments in his way when he tried to obtain such information (R. 1663). Just how petitioner by motion in the District Court could compel the Trustee to make a bona fide investigation is not evident.

The fact that the Trustee's investigations and reports were only of a perfunctory nature is relevant to petitioner's contention that neither the Commission nor the District Court made that investigation necessary to assure control of the debtor in the interest of all of its security holders upon emergence from reorganization.

As to Southern Pacific's discussion of Point III of petitioner's brief:

That the allegations of the complaint and the contents of the Western Agreement were newly discovered evidence has been fully shown in the discussion in petitioner's brief (pp. 42-47).

As to the fact that the suit constitutes a new development, Southern Pacific avers that: "Actually, the suit would not have any effect upon the decision and is of very doubtful relevancy" (S. P. Brief, p. 40).

The relevancy and importance of the Government's suit to the issues on the appeal to the Circuit Court of Appeals is fully discussed in petitioner's motion to remand (R. 5337, 5337-5379).*

Petitioner there shows that under the illegal agreement set forth in the Government's complaint, other railroads, competitive with debtor, slowed up the movement of transcontinental traffic over their more expeditious and direct routes to accommodate the more circuitous routes of the Southern Pacific.

Southern Pacific in consideration thereof, in order not to take traffic from these roads, failed (1) to perform the Turney-Saunders agreement to solicit traffic preferentially for the debtor; (2) to lease the property of the debtor, which would have been accompanied by large savings in operation and a great increase in traffic to debtor; and (3) to take various other steps in the development of debtor. If these steps had been taken by Southern Pacific,—or even only some of them,—the earnings of the debtor would have been greatly increased, with some detriment, however, to the earnings of other roads to which Southern Pacific was under obligation.

Another consideration moving from the other railroads to Southern Pacific was their acquiescence in the excessive car rental charges of Pacific Fruit Express, in which company Southern Pacific has a 50% stock interest (R. 1135). The revenue derived by Southern Pacific from Pacific Fruit Express at the time constituted a large proportion of its total income (R. 5378).

Southern Pacific argues (p. 41) that loss of perishable traffic moving over the circuitous joint route maintained by Southern Pacific with debtor for traffic originating

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* Petitioner's statement in the hearings before the Senate Committee on Interstate Commerce, 79th Cong., 2d Sess., on H.R. 2536 (Bulwinkle Bill) contains a brief discussion of some of these facts (see pp. 664 *et seq.*).

west of El Paso would result in harm to the debtor. The proof in the record in the hearings before the Commission and the additional proof obtained in the hearings before Judge Davis shows that the perishable traffic moving over these joint routes was carried at a loss in net railway operating income to debtor of one million dollars per annum (R. 900-925, 3637, 5366-74, 5490-91).

It is Southern Pacific's contention that the outcome of the Government's suit against the railroads west of the Mississippi will not be known for a long time. In a footnote it is stated: "Two years after the motion was made the suit has still not been brought to trial" (S. P. Brief, p. 40).

As appears from petitioner's brief (p. 46), the Government and the defendants were to meet with the Court on January 16, 1947, for the purpose of recommending that the Government be allowed to start putting in its case on April 1, 1947, under a shortened trial technique. Petitioner's latest information from the office of the Attorney General is that the case is set for trial on April 23, 1947, and that a stipulation has been entered into, which met the court's approval, that since the case is wholly documentary the Government will complete its prima facie case in from one to three days.

As to Southern Pacific's discussion of Point IV of petitioner's brief:

Southern Pacific compares the position of a successor judge in approving a reorganization plan of the Commission in a Section 77 proceeding to the position of a successor judge in ruling upon a motion for a new trial after a verdict has been rendered or findings of fact and conclusions of law have been filed by the judge who presided at the trial (S. P. Brief, p. 47). It is the theory of Southern Pacific that in ruling upon a motion for a new trial after findings of fact, the successor judge is merely passing on the legal sufficiency of the evidence.

In many instances, however, it has been found necessary by statutory enactment to confer such power on a successor judge. An instance in point is the amendment to the federal statute enacted after *Malony* v. *Adsit*, 175 U. S. 281, discussed in petitioner's brief in support of his petition (p. 48).

Southern Pacific, in making its comparison, disregards the fact that it is mandatory on the court under subsection (e) of Section 77, if objections are filed to the plan of reorganization, to "hear all parties in interest in support of, and in opposition to, such objections to the plan * * * ." Thus, the function of the judge in a Section 77 proceeding is not limited to reviewing the proof in the record in the hearings before the Commission.

Southern Pacific (p. 48) further argues that inasmuch as findings of fact by the court are not contemplated in a Section 77 proceeding, on that account "any limitations imposed by Rule 63, contingent upon whether death of the presiding judge occurred before or after he had made findings of fact" are not applicable.

Rule 63 does not create the right to a new trial upon the death of the judge who presided. Rule 63 and its predecessor statute conferred the right on a successor judge to pass upon a motion for a new trial, but only if the death or disability of the presiding judge occurred after a verdict or findings of fact and conclusions of law had been filed (Petitioner's Brief p. 48). The absolute right to a new trial upon the death of a judge existed long previous to the enactment of Rule 63 or its predecessor statute, and quite irrespective of whether findings of fact were or were not necessary in connection with an action at law, a suit in equity or any other legal proceedings.

Southern Pacific, with all its fine-spun but fallacious arguments, cites no decisions in support of its position that, in hearings upon objections in a Section 77 proceeding, upon the death of the presiding judge a new trial

is not a matter of right. Even if Southern Pacific's reasons for making an exception to the general rule were sound, which is not the case, the remedy is to be found not in the courts but in the legislature.

It is highly probable that Judge Moore in the instant case would not have failed to review the proof in the record before the Commission, if he had availed himself of the opportunity of holding hearings upon the objections and of addressing such questions to witnesses and counsel as would have contributed to his understanding of the case.

Southern Pacific states that the testimony introduced in the District Court was entirely improper or immaterial. If it was permissible for the Commission to consider the record of earnings of debtor after September 1939 in estimating prospective earnings,—as it undoubtedly was,—it was permissible to place in the record in the hearings before Judge Davis proof as to the illegal impairment of such earnings.

Southern Pacific in its brief (p. 50) states that petitioner never filed any motion to take additional testimony though "Judge Moore's order taking the case as submitted on the record made before the Commission and Judge Davis, contained a provision that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182)." A similar statement is made by respondents Chase National Bank and Mississippi Valley Trust Company (Brief, p. 26) and Protective Committee for the First Terminal & Unifying Mortgage bonds (Brief, p. 16).

The Circuit Court of Appeals held (R. 5567):

> "Nor is participation, by argument and brief, in the hearing under the order sufficient to constitute waiver even though Mr. Meyer did not therein reiterate his right to new trial."

The Court erred in stating that petitioner did not so reiterate his right to a new trial. This error was undoubtedly due to the fact that the reply briefs of Southern Pacific (p. 100), and of the debtor (p. 10), submitted to the Circuit Court of Appeals, contained statements to the effect that petitioner had made no such motion.

Inasmuch as the District Court had held that petitioner was not entitled to a new trial, there was no occasion to reiterate that right by argument or brief.

But petitioner did, in accordance with the opportunity afforded by the terms of the Court's order, move to reopen the proceedings for the purpose of taking additional testimony and documentary evidence.

While the transcript of petitioner's oral argument before Judge Moore is not part of the record herein, it appears from said transcript that at the opening of his oral argument on May 31, 1943, petitioner said: "* * * I desire to have the proceedings reopened for the purpose of taking additional proof, documentary evidence and testimony * * *. I am here primarily to move to reopen the proceedings * * *" (pp. 3, 4). At the conclusion of his oral argument, petitioner again stated: "* * *I respectfully move that the Court should reopen this case" (p. 69). His reasons for so moving were stated at considerable length.

Petitioner's brief submitted to the District Court is entitled:

> "Brief of Walter E. Meyer, Intervener, in support of his motion for reopening of the proceedings, and in support of his objections and statement of claims for equitable treatment in respect of the plan of reorganization of the debtor."

In the conclusion of his brief petitioner requested that the proceedings be reopened to enable him to take additional proof.

As to the Briefs in Opposition of the Other Respondents:

Changed conditions form the subject of debtor's and Southern Pacific's petitions and briefs in support thereof filed with this Court and Point V of petitioner's brief (pp. 51-61). This subject is discussed in the briefs in opposition of the Guaranty Trust Company (pp. 5-18); of the Protective Committee (pp. 16-29); and of The Chase National Bank and Mississippi Valley Trust Company (pp. 7-21).

In all of these briefs in opposition, petitioner is grouped with the two other petitioners, Southern Pacific Company and the debtor, as maintaining that the debtor is solvent. In the opinion of this petitioner debtor is at present solvent. In the discussion in his brief of changed conditions, however, petitioner makes no reference to debtor's solvency.

The changed conditions which in the opinion of petitioner it is reasonable to assume that the Commission could *not* have envisaged at the time of its report in June, 1941, and its supplemental report in March, 1942, are (a) the extraordinary earnings of the debtor during the war and the post-war period; (b) the large decrease in indebtedness; and (c) the very great increase in net current assets, including large amounts of cash available to pay maturities past due in the order of their seniority.

The Commission's plan provides for a capitalization of $75,000,000. The total indebtedness as of January 1, 1942, was $83,243,643 (R. 3785). Thus $8,243,764 of indebtedness remained unprovided for (R. 3782).

Indebtedness in the amount of $10,207,820 has been paid off since the supplemental report of the Commission of March 9, 1942.

As appears from the Comparative General Balance Sheet of debtor for the ten months ended October 31,

1946, which is annexed to the petition of debtor (Appendix B, pp. 60-61), net current assets as of that date, amounted to $22,090,504. Total current assets amounted to $32,545,847. These included: Cash, $1,281,304; Temporary Cash Investments, $21,708,620; and Special Deposits, $1,385,962. Total current liabilities amounted to $10,455,343.

As of November 30, 1946, net current assets amounted to $22,632,345. There has been no substantial change in the cash position of debtor (Dist. Ct. Pr. R. 10636-37).

For December, 1946, debtor earned in net income over and above interest charges $621,233. The carloadings of debtor for the first six weeks of 1947 amounted in round figures to 46,000 cars as compared with 43,000 cars for the same period of 1946 (Moody's Railroads). With a 17.6% rate increase, it is reasonable to expect that debtor will earn in net income over and above interest charges for the year 1947 an amount at least equal to the $4,665,668 earned in 1946.

There is cash in the treasury of the debtor available for the reduction of indebtedness in the amount of at least $17,000,000. Thus, together with reduction in principal and accrued interest already made, as compared with January 1, 1942, it is practicable to reduce the indebtedness in all by over $27,207,820, or 32.7%. By these means maturities, bearing interest for the most part at 5 percent, could be so reduced as to effect savings of $800,000 per annum, thus permanently increasing debtor's earnings in normal times at least in that amount (Petrs. Brief, p. 57).

These, and not the solvency of the debtor, are some of petitioner's reasons why changed conditions necessitate a new plan of reorganization.

The briefs in opposition rely upon the holding of this Court in the *Denver* case as a precedent to preclude consideration of changed conditions in the case of the debtor.

In the *Denver* case the petition for reorganization was filed on November 1, 1935, and the plan was to become effective June 1, 1943. The date of the final report of the Commission was June 14, 1943. The District Court approved the plan on October 25, 1943; the Circuit Court of Appeals reversed on May 10, 1945; and this Court passed upon the matter on June 10, 1946.

In the case of the debtor, the petition for reorganization was filed on December 12, 1935; the plan was to become effective as of January 1, 1942. The date of the final report of the Commission was March 9, 1942. The District Court approved the plan on February 9, 1944, and the Circuit Court of Appeals affirmed on August 26, 1946. The petition for a writ of certiorari was filed by this petitioner on January 18, 1947.

It thus appears that in the *Denver* case the plan was formulated a year and three months later than in the case of the debtor. In the *Denver* case this country had been in the war for over eighteen months. When the plan for the debtor was formulated, this country had been in the war only three months.

In the *Denver* case the period that elapsed between the formulation of the plan and approval by the District Court was four and a half months; in the debtor's case a year and 11 months.

In the *Denver* case the period that elapsed between the formulation of the plan and the decision of the Supreme Court was three years; in the case of the debtor this period is now almost five years.

In the *Denver* case, the plan of reorganization was submitted to and approved by all the security holders with the exception of the junior bondholders. In the case of the debtor, the plan has not yet been submitted to the security holders.

The earnings of the *Denver* were greatest in 1942, the year immediately preceding the rendition of the Com-

mission's report. For the years 1943 and 1944 there were successive declines in earnings (90 L. ed. 1134, 1144). During the year 1945 there was a large deficit, to which heavy writeoffs for amortization of defense projects contributed. In 1946, however, with little or no amortization of defense projects, *Denver* was operated at a net loss of $4,079,889 (Moody's Railroads).

Debtor's earnings year after year up to and including the first nine months of 1945 showed an increase over 1941, the last full year previous to the date of the formulation of the plan (Petrs. Brief, p. 51). In contrast to *Denver's* loss for the year 1946, the debtor earned in net income over and above interest charges for the year 1946 the sum of $4,665,668.

In the opinion of this Court in the *Denver* case (90 L. ed. 1134, 1146), it is stated:

> "* * * it is clear that when the Commission made its allocations it had definitely in mind that one thing that gave the senior creditors compensation for the admission of junior claimants to participation in securities before the seniors obtained full cash payment was their chance to share in the unlimited dividends that might be earned and paid on the common stock * * * in the 'lush years'."

In a footnote the Court refers to three statements in the report of the Commission, 254 I. C. C. at 365, 364 and 366, respectively, confirmatory of this.

There are no such statements in the report of the Commission in the case of the debtor.

In the *Denver* case one of the issues was whether the additions and betterments in the amount of $43,291,513 so increased the earning prospects of the road as to justify a greater capitalization (90 L. ed., p. 1144). While the reduction in principal indebtedness was comparatively small in the *Denver* case (p. 1149), in the case of the

debtor, as we have seen, it has been of considerable importance. In addition, in the case of the debtor the cash in the treasury in proportion to total capitalization is very much greater than in the case of the *Denver*.

The present plan, if adopted, while redounding greatly to the advantage of Southern Pacific Company, The Chase National Bank and the Mississippi Valley Trust Company, will result in great injustice to other security holders.

It is petitioner's contention that Southern Pacific instigated these reorganization proceedings prompted by ulterior motives (Pet., p. 9). Chairman Eastman of the Commission pointed out the advantageous position Southern Pacific would be in upon the termination of the reorganization proceedings (R. 3730-31). Neither the majority members of the Commission nor Chairman Eastman could have imagined the extraordinary advantages that will accrue to Southern Pacific and the creditor banks if the present plan of reorganization is put into effect.

These advantages appear from the following:

Under the present plan $18,749,961 new common stock will be issued.

As of January 1, 1942, Southern Pacific's claim amounted to $17,882,250 and with accrued interest to $23,456,025. Southern Pacific is to receive $4,355,844 Consolidated Mortgage 50-year 4's or 18.6%; $7,213,447 5-percent preferred stock or 30.8%; and $10,351,672 new common stock or 44.1%; or in all $21,920,963 par value of new securities or 93.5% of its claim (R. 3785).*

Southern Pacific thus receives 55.21% of the new common stock to be issued.

* In addition to receiving securities in the new company, Southern Pacific and the banks retain their Southern Illinois and Missouri Bridge Company bonds now held by them as collateral. Of these Southern Pacific holds $474,000 par value; Chase National Bank $98,000; and Mississippi Valley Trust Company $28,000 (R. 3781).

On balance, since January 1, 1942, the effective date of the plan, there has been a reduction of accrued interest owing to Southern Pacific in the amount of $3,990,288, or 17.0% of the total amount of its claim as of that date (Petrs. Brief, p. 55).

If the free cash in the treasury in the amount of $17,000,000 is distributed to the common stockholders, this would be equal to $90.67 per share. On the basis of, say, a cash dividend of $90 per share the new common stockholders would receive $16,874,965. This on Southern Pacific's $10,351,672 par value of new common stock would amount to $9,316,505. In addition to the $3,990,288 reduction in accrued interest already paid, by such cash distribution Southern Pacific would receive in all the sum of $13,306,793 in reduction of its claim of $23,456,025 as of January 1, 1942.

With the total amount of its claim reduced to $10,149,232, Southern Pacific would still be the owner of $4,355,844 First Mortgage bonds; $7,213,447 5% preferred stock and $10,351,672 common stock, or a total of $21,920,963 of securities of the new company.*

The indebtedness to the Chase National Bank amounts to $3,500,000 and with accrued interest to January 1, 1942, to $4,557,591. For this the Chase Bank receives under the plan $896,845 or 19.7% in Consolidated Mortgage 50 year 4s; $1,485,210 or 32.6% in 5% preferred stock; and

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* The Circuit Court of Appeals stated, referring to the claims of Southern Pacific and the banks, that the participation in the plan allowed these creditors "seems to be based on the value of pledged security rather than face of loans plus accrued interest" (R. 5670). Petitioner pointed out in the brief in support of his petition (pp. 59-60) that Southern Pacific was entitled to be treated as a secured creditor only to the extent of $7,165,485 of the face amount of its claim. Interest on this claim up to January 1, 1947, amounted to $10,044,338 (Petitioner's Brief, p. 55), or 56% of the claim. The President in his memorandum of disapproval of Senate Bill 1253 stated that one of the objections to the bill was that it failed "to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in Section 77 proceedings."

$2,131,354 or 46.8% in common stock, a total of $4,513,409, or 99.1% of its claim, and, in addition, retains $98,000 Missouri Illinois & Southern Bridge Co. bonds. On balance, accrued interest as of January 1, 1947, as compared with the interest due on January 1, 1942, has been reduced by $867,125. Assuming a cash dividend of $90 per share on the new common stock, the loan would be reduced to $1,772,247. The Chase Bank would thus have a total commitment in the new company of $1,772,247, as against which it would have securities of a total par value of $4,513,409 in the new company and $98,000 par value of the Bridge Company bonds.

Similarly, the loan of the Mississippi Valley Trust Company would be reduced from $1,302,169 as of January 1, 1942, to $506,832, as against which it would have securities of a total par value of $1,288,956 in the new company and $28,000 par value of the Bridge Company bonds.

It is not necessary to assume that all of the cash available will be distributed immediately to the common stockholders to demonstrate, as appears from the above, the inequity of the present plan.

That, if the plan is approved, Southern Pacific, as dominant and virtually controlling stockholder, will be in a position to cause debtor to make such distribution, there can be no doubt.

CONCLUSION

For the reasons urged therein, the petition for a writ of certiorari should be granted.

Dated: New York, February 28, 1947.

Respectfully submitted,

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And as Attorney for other Stockholders.

R. WALSTON CHUBB,
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In the Supreme Court of the United States

OCTOBER TERM 1946

No. 909

WALTER E. MEYER, Intervener,
Petitioner,

vs.

BERRYMAN HENWOOD, as Trustee of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY LINES, et al.,
Respondents.

Brief by Southern Pacific Company, One of the Respondents, in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM 1946

No. 909

WALTER E. MEYER, Intervener,
Petitioner,

vs.

BERRYMAN HENWOOD, as Trustee of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY LINES, et al.,
Respondents.

Brief by Southern Pacific Company, One of the Respondents, in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the Circuit Court of Appeals below is reported at 157 F.(2d) 337 (R. 5559-5680). The District Court's opinion is reported at 53 F. Supp. 914 (R. 5183-5212). The Interstate Commerce Commission's report and order (R. 3495-3735) are reported at 249 I.C.C. 5, and the Commission's supplemental report and order (R. 3736-3820) are reported at 252 I.C.C. 325.

STATUTE INVOLVED

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) are set forth in the Appendix hereto.

STATEMENT

A. RESPONDENT'S POSITION ON THE QUESTIONS PRESENTED

Petitioner Meyer, a stockholder in St. Louis Southwestern Railway Company (hereinafter referred to as Debtor), has presented as the fifth question in his petition (p. 18), "In view of the great improvement in net assets, reduction in principal indebtedness and accrued interest, improvement in net current assets and in earnings since the supplemental report of the Commission, is a new plan of reorganization necessary?" Southern Pacific Company (hereinafter referred to as Respondent), owner of approximately 87% of the stock of the Debtor, does not object to the granting of the writ, limited to the consideration of this question. It has heretofore filed in this Court its petition for a writ of certiorari to the Court below, which has been docketed at this term as No. 879, under the title *Southern Pacific Company, a Railroad Corporation, Intervener, Petitioner, vs. Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, et al. Respondents,* and the Debtor has likewise filed its petition for a writ of certiorari, Docket No. 936. In both of these petitions it is urged that the Circuit Court has erred in failing to set aside the Interstate Commerce Commission's plan of reorganization for Debtor as inequitable because

of its failure to award any recognition to stockholders in view of Debtor's greatly improved asset position and earnings since the Commission's decision. The Petitioner's fifth question raises the same general question which is fully dealt with in the petitions and briefs of Respondent and the Debtor.

Questions 1 to 4, stated on pages 16 to 18 of Meyer's petition, go to quite different matters arising from charges repeatedly made by Meyer before the Commission and the lower Courts: (A) that the Commission's valuation of Debtor's properties was unduly low when made because failing to recognize that Debtor's past earnings, on which it was based, had been impaired by acts of many parties, including Respondent, who had successively controlled Debtor, allegedly in breach of fiduciary and contractual obligations and in violation of the antitrust laws; and (B) that a creditor claim of Respondent against Debtor, accorded recognition in the reorganization plan, should be expunged, or at least subordinated to the interest of the minority stockholders, because of Respondent's allegedly wrongful acts in its relations with Debtor, both before and after it acquired control. Briefly, these questions concern, respectively:

1. Claim that a successor judge in the District Court could not consider testimony taken at a hearing held before a judge who had died, with respect to the Commission's plan, even though opportunity was given to intervener Meyer to supplement or add to such testimony, of which opportunity he did not take advantage.

2. Claim that the Court should have considered independently of the findings and conclusion of the

Commission, Meyer's charges, which had been rejected by the Commission, that various railroads, including Respondent, had committed wrongful acts toward the Debtor.

3. Claim that the Commission and the District Court erred in alleged failure to exercise investigatory powers vested in them to examine into the wrongful acts alleged by Meyer to have occurred.

4. Claim that, after the case was in the Circuit Court of Appeals, a motion by Meyer to stay the appeals or remand the case to the District Court on account of newly discovered evidence should have been granted.[1]

Respondent opposes the granting of a writ of certiorari which would bring to this Court for consideration the questions just stated, because, first, the decision of the Court below was clearly correct upon each of the questions; secondly, none of the questions presents matters of general consequence and they are not of a character which customarily prompts this Court to grant certiorari; and, thirdly, the bringing of these questions to this Court for review would call for an appraisal of the merits of Meyer's oft-rejected contentions spread over thousands of pages of record and already dealt with in voluminous opinions of the Commission and the Courts below. The proliferation through this proceeding of Meyer's charges against all and sundry has tended to obscure the real strength of the case, which the Debtor and Respondent

1. This summary statement of the questions is sufficient to indicate what they concern. They will be taken up and stated more fully hereafter in the argument upon each question.

advance with confidence, that changed circumstances now warrant the sending of the plan back so that recognition may be given to the interests of the stockholders, including Respondent, Meyer and others.

B. THE FACTS

A background of facts must be sketched for an understanding of the matters sought to be brought before the Court by petitioner Meyer. Meyer's statement (pages 1 to 15 of his petition) does not suffice, because it sets forth, as facts, claims uniformly rejected by all who have considered them. It is possible that Meyer is merely stating his charges on page 2 when he refers to the record of earnings of the Debtor as impaired by illegal control by successor railroads—the opposite having been found by the Commission (R. 3604, 3637 and generally 3593-3637)—and to Respondent's wrongful and unlawful acts—the opposite having been found by the Commission (R. 3637, 3669 and generally 3624-3671). However, he later affirms as facts, time and again, matters which are untrue and proved to be untrue; e.g., the assertions in the first two full paragraphs on page 8 that Respondent did not solicit traffic for Debtor in accordance with a traffic agreement known as the Turney-Saunders agreement,[2] whereas the opposite had been found by the Commission (R. 3657, 3669, 3670), which finding was approved by the District Court (R. 5202) and by the Circuit Court (R. 5588). We shall outline the case as we see it, giving only uncontested facts

2. This was a traffic agreement between Respondent and Debtor entered into in November, 1932, under which Respondent agreed, with important exceptions, to solicit traffic preferentially for Debtor (R. 3652).

or, where so indicated, contested facts as found by the Commission or the Courts.

Prior to October 25, 1929, Respondent, its subsidiary, Texas and New Orleans Railroad Company, and Debtor were connecting railroad lines, but Respondent was not a stockholder or creditor of Debtor. Soliciting agreements existed, and joint traffic was built up of great value to both Respondent and Debtor (R. 3627). On October 25, 1929, Respondent began to purchase stock of the Debtor on the market (R. 3586). Between October 25, 1929, and July 1930, Respondent acquired on the market 42,600 shares of Debtor's common stock and by private purchase 87,200 shares of preferred stock (R. 3586). These purchases did not give control of the Debtor, but, on July 15, 1930, an agreement was entered into between Respondent and Kuhn, Loeb & Company under which Respondent, subject to approval by the Interstate Commerce Commission, had the right to acquire 24,700 additional shares of Debtor's common stock and 59,380 additional shares of preferred stock, which would give it numerical control. The Commission, after extended hearings, authorized acquisition and control of the Debtor and the purchase of the stock by Respondent by order becoming effective April 14, 1932 (R. 3588; *St. Louis S.W. Ry. Co. Control,* 180 I.C.C. 175). Thereupon, Respondent acquired the stock which had been the subject of the agreement and made an offer to minority stockholders as prescribed by the Interstate Commerce Commission (R. 3591).

After Respondent had taken control, it, as the Commission has found, permitted Debtor to operate as an independent carrier with a competent, independent and loyal

management (R. 3669, 3670). In November, 1932, a new traffic agreement was executed between Respondent and Debtor, called the Turney-Saunders agreement, which was helpful and to the benefit of the Debtor, as the Commission has found (R. 3670). The Commission considered at great length the management provided by Respondent for the Debtor and summarized its conclusion (R. 3669, 3670) as follows:

> "The general contention that the Southern Pacific failed to exercise control over the debtor in the debtor's interest and to exercise its competitive power in the debtor's behalf is not sustained, for the reason that the Southern Pacific appears to have exercised its control over the debtor in the debtor's interest, to the full extent required, by the election of directors who provided the debtor with a competent and independent management loyal to the debtor's interest, and to have exercised its competitive power in the debtor's behalf to the full extent required, through the making and carrying out of the Turney-Saunders agreement."

The Debtor in June, 1932, was confronted with a maturity of $20,727,750 of its consolidated mortgage 4% bonds (R. 3642-3643). In order to finance this maturity the Debtor was required to borrow $17,000,000 from the Reconstruction Finance Corporation. As a condition for its approval of the loan, the Commission required the guaranty of collection thereof by Respondent. *St. Louis Southwestern Ry. Co. Reconstruction Loan,* 184 I.C.C. 74, 83 Respondent did give this guaranty, and the 1932 maturity was met successfully (R. 3644). On July 13, 1936, Respondent paid the Reconstruction Finance Company the full

amount of the indebtedness guaranteed and received an assignment of the note (R. 3990). It was by reason of this transaction, entered into for the benefit of the Debtor that Respondent became a creditor of the Debtor. It is this indebtedness, incurred to save the Debtor from financial difficulty in 1932 and given recognition in the Commission's reorganization plan that Meyer urges should be expunged, or at least subordinated to his earlier stock investment in the Debtor (page 17, his petition, and page 26, his brief).

Shortly after the purchase of the stock of the Debtor by Respondent, the depression of the '30s ensued. How severe its effects were upon business, and especially upon railroads, is known to all. The railroad industry serving the Southwest was hit especially hard. The Missouri Pacific Railroad Company, the St. Louis-San Francisco Railway Company and the Chicago, Rock Island and Pacific Railway Company filed petitions in reorganization in the fore-part of 1933. On July 31, 1941, railways owning 31.04% of the entire railroad mileage in the country were in receiverships or trusteeships (Fifty-fourth Annual Report [1940] of Interstate Commerce Commission, p. 27). The Debtor resorted to reorganization proceedings on December 12, 1935. At that time it had experienced deficits, in net income, after charges, for six consecutive years, including 1935. These deficits were: For 1930, $445,481.36; for 1931, $291,916.98; for 1932, $3,471,325.05; for 1933, $1,536,894.32; for 1934, $1,145,436.53, and for 1935, $455,-195.05 (R. 101). Important obligations could not be renewed, as found by the Commission (R. 3561). By order dated January 3, 1936, the District Court below appointed

Berryman Henwood, of St. Louis, as trustee of the Railway Company and specified subsidiaries (R. 93-96), and since that date Henwood has been in complete charge of the properties of the Debtor. Respondent has been without power, and has not attempted, to influence the operation of the Debtor's railroad by the trustee under the direction of the District Court below. It has endeavored to the best of its ability to carry out the Turney-Saunders agreement and to support the Debtor in respect of traffic (R. 3670, 5202).

Due in part to the war, but in part also to efficient management and to the assistance which the Debtor has received from Respondent in respect of traffic, the Debtor has outstripped other railroads (see Meyer's brief, pp. 52, 53) and, in our opinion, has been restored to solvency.

A brief review of the proceedings in the reorganization is also required for an understanding of the questions presented in Meyer's petition. As stated above, the Debtor's petition for reorganization under Section 77 of the Bankruptcy Act was filed on December 12, 1935. The filing of the petition was approved by the Honorable Charles B. Davis in the District Court below, over the opposition of Meyer (R. 87-91).

The Court, in accordance with Title 11 U.S.C. Sec. 205 (c)(7), directing that the judge shall promptly determine and fix the time within which claims may be filed and the manner in which they may be evidenced and allowed, by its Order No. 28, dated February 5, 1936 (R. 3953-3955) and by its Order No. 81, dated May 22, 1936 (R. 3955-3961) fixed times and procedures in respect to the filing of claims. By its Order No. 184, dated April 13, 1937 (R.

3961-3962) it provided an extended time for filing of protests and objections to allowances of any claims which had been filed. By its Order No. 272, dated February 25, 1938 (R. 3962-3965) it referred the determination of claims to Honorable Marion C. Early, Special Master. Pursuant to these orders, the Reconstruction Finance Corporation, on March 18, 1936, filed its claim in respect to the indebtedness of the Debtor on account of the note held by it (R. 3965). The Reconstruction Finance Corporation assigned the note and claim to Respondent, which assignment was filed with the Court on July 21, 1936 (R. 3975-3981). Within the time allowed therefor, two corporations filed protests to the assigned claim held by Respondent (R. 3982-3984). After extended hearings, the Master filed with the Court, on August 25, 1939, his findings of fact and conclusions of law (R. 3985-3995). He found, among other things, that Respondent "did not overreach, coerce or take any advantage of Debtor, St. Louis Southwestern Railway Company, by reason of the fact that it owned approximately 87 per cent of its capital stock" (R. 3991-3992), and recommended the claim be allowed (R. 3994). The protesting corporations took exceptions to the report of the Special Master, objecting to his allowance of and refusal to subordinate the Respondent's claim (R. 3996), but the Court, on January 26, 1940, held that the report of the Special Master should be sustained, the protest disallowed, and the claim of Respondent allowed (R. 4002-4003). No appeal was taken in this decision. Meyer filed no protest to Respondent's claim on the note and took no part in the proceedings thereon.

On December 7, 1936, within the time allowed therefor, Debtor filed a plan of reorganization with the Commis-

sion, and other plans were filed by other parties (R. 3496). Hearings upon the plan of reorganization were held on March 16, 1937, were recessed, and were concluded on April 24, 1937 (R. 3497). At these hearings, Petitioner Meyer presented numerous charges that Respondent and those previously in control of Debtor had impaired its earnings by various alleged breaches of fiduciary obligations, contracts and the antitrust laws. These were summarized and disallowed in the proposed report of Examiner J. V. Walsh, filed February 7, 1938 (R. 255, 306-314). The case was argued before the full Commission upon exceptions to the proposed report on May 16, 1938 (R. 3496). A petition was filed in April, 1937, by Petitioner Meyer for an investigation by the Commission and for such other relief as might seem meet in respect of his charges against Respondent and others (R. 339-351). This was amplified by a supplemental petition filed June 21, 1937 (R. 357-467), in which the prayer requested, in addition to an investigation, an opportunity for the Petitioner to introduce evidence at reopened hearings. These petitions were denied by order of July 12, 1937 (R. 479-480), but the Commission on January 25, 1939, entered a further order reciting that it had under further consideration these petitions, and directing that the proceedings should be reopened "with respect to the matters alleged in said petitions, in so far as they may be relevant and material in this proceeding" (R. 501). Hearings pursuant to this order were held from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 3549). At these hearings, Meyer presented his case relative to his charges against Respondent and others, and his adversaries presented tes-

timony on their part. The hearings were conducted by Commissioner Clyde B. Aitchison and Examiner Walsh. On June 30, 1941, the Commission issued its report in which it generally and specifically found against each contention of Petitioner Meyer (R. 3547-3678). A petition for modification was filed by Meyer, along with petitions by others for modification of various phases of the report, and the Commission on March 9, 1942, issued its supplemental report maintaining and elaborating upon its findings against Meyer's contentions (R. 3742-3752).

The Commission in painstaking fashion made specific findings on all Meyer's particular charges and also made the following ultimate findings:

> "Meyer's general contention, that during the period beginning in March 1925 and continuing until April 15, 1932, the debtor's traffic was unfavorably affected and its earnings greatly impaired by wrongful and unlawful acts of the Southern Pacific, is not sustained by the record." (R. 3637)
>
> "From the evidence presented we find no basis for a conclusion that the Southern Pacific exercised control of the debtor prior to our authorization; or exercised such control in an improper manner after such authorization." (R. 3646)
>
> "The general contention that the Southern Pacific failed to exercise control over the debtor in the debtor's interest and to exercise its competitive power in the debtor's behalf is not sustained, for the reason that the Southern Pacific appears to have exercised its control over the debtor in the debtor's interest, to the full extent required, by the election of directors who provided the debtor with a competent and independent management loyal to the debtor's interest, and to have exercised its competitive power in the

debtor's behalf to the full extent required, through the making and carrying out of the Turney-Saunders agreement." (R. 3669, 3670)

"We are of the view that Meyer has had a full and fair opportunity to obtain and present evidence in support of his charges, and that such charges have been sufficiently investigated. The request for a reopening of the proceeding is denied." (R. 3675)

"We are of the view that the investigations already made are sufficient, and that further investigation of any of the matters brought to attention by Meyer in this proceeding would serve no useful purpose. His request for further investigation is denied." (R. 3676)

"Meyer argues that because of the facts of record, already discussed, the Southern Pacific's interest as a creditor and stockholder of the debtor should be subordinated to the interest of all other creditors and all other security holders of the debtor; and that title to causes of action which he alleges the debtor has against the Kansas City Southern, Kuhn, Loeb & Company, Southern Pacific Company, and others, arising out of the alleged conspiracy by which the debtor was, as alleged, illegally controlled for many years, should be reserved and vested in a trustee for the purpose of bringing suit. He also argues that title to causes of action which the debtor has, as alleged, against the Southern Pacific Company, the Union Pacific, Kuhn, Loeb & Company, and others, arising out of the failure, as alleged, of the Southern Pacific to exert its competitive power for the debtor, should also be reserved and similarly vested in a trustee for the purpose of bringing suit, as well as all other causes of action which the debtor may have against corporations and individuals legally liable for damage to the debtor. It is sufficient to say here that we have not found the existence of any con-

spiracy, or damaging bad faith or fraud on the part of the Southern Pacific and the other parties named, and there appears to us to be no cause of action as to which we should make the desired reservation in our reorganization plan." (R. 3678)

"As to erroneous evaluation of the evidence, he points to the division of views among members of this Commission. But there was no division of views on the question whether his representations had been fully and fairly considered, or on the question whether more protracted investigations were advisable. He also urges that if there is any residuum of doubt in our minds, or only a suspicion that the debtor has a cause of action against the Southern Pacific, that cause of action should be reserved in a trustee for the purpose of bringing suit, because after reorganization the Southern Pacific will have so close to a majority of the voting stock. It is sufficient in our view that the weight of the evidence does not justify the reservation of such a trust." (R. 3746)

On March 23, 1942, the Commission, in accordance with the provisions of 11 U.S.C. Sec. 205(e), certified the plan of reorganization, as modified by its supplemental report, to the District Court (R. 3494). Meyer, among others, filed objections in the Court to the plan (R. 3840). These objections reiterated his charges that the valuation was unduly low because based on past earnings allegedly depressed by illegal acts of those successively in control of Debtor and requested, among other things, that the interest of Respondent as a creditor and stockholder because of its illegal acts be expunged, or at least subordinated to all other creditors and stockholders of Debtor (R. 3842). A hearing was held before Judge Davis upon the plan of

reorganization and the objections thereto, at which considerable testimony was introduced, principally by Meyer (R. 4051). The Court issued an order confining testimony to matters occurring subsequent to the consideration of the plan by the Commission (R. 4186). The hearing was concluded on November 5, 1942 (R. 4993) with provision for additional arguments to be made at a later date by Meyer and the Debtor. Before arguments had been made and briefs filed, Judge Davis died. Judge Moore called the parties for a conference on April 23, 1943, to ascertain their views as to further procedure (R. 5137). After the conference the Court entered an order (R. 5181-5183) taking the case as submitted on the record as made before the Commission and on the testimony as taken before Judge Davis, with provision for oral argument on May 31, 1943, and for briefs. There was a further provision in the order that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182). In accordance with this order, all of the parties so desiring argued the case before Judge Moore and filed briefs. Petitioner Meyer argued orally and filed briefs with Judge Moore but filed no motion for the taking of additional testimony or otherwise as to the completion of the record. On February 9, 1944, Judge Moore rendered his opinion and order approving the plan of reorganization and overruling all of the objections thereto, including those of Petitioner Meyer (R. 5183-5213).

With respect to Meyer's charges the District Court said (R. 5199, 5202, 5203):

> "Meyer asks that the creditor's claim of the Southern Pacific Company be expunged, or at least subordi-

nated to those of all other claimants. This action, if it were justified, might well result in allowing some equity for the present stockholders. However, at the time this Court ordered the filing of claims, opportunity was given to other parties to object thereto and Meyer did not avail himself of that opportunity. The group referred to above as the foreign bondholders did object to the allowances of Southern Pacific's claim and extended hearings on the objections were held before a special master. The report of the master, finding in favor of the claimant and against the objectors, is recorded in the permanent record of these proceedings, Vol. X, pp. 5109-5123. Exceptions were taken to the Master's report, the objections were overruled and the claim allowed. While it does not appear that the issues raised by the objections are coextensive with those raised by Meyer in his objections to the plan, he was a party in the reorganization proceedings and had the opportunity to object at that time. In view of this, together with other opportunities to have his day in court which Meyer has taken advantage of and which will be discussed infra, we think the matter is no longer open to question." (R. 5199)

"We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case. He has not convinced either this Court or the Commission that his charges are well-founded. The allegations against the Southern Pacific outlined herein were before the Commission and were considered by it." (R. 5202)

"The question of the feasibility of a lease is, of course, a matter within the exclusive jurisdiction of the I.C.C. (49 U.S.C. 5). This, as well as a determination of the validity of Meyer's charges of bad faith, are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I.C.C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization." (R. 5203)

Appeals from the District Court's order approving the plan were filed in the Circuit Court of Appeals by the Debtor, Respondent and Meyer. In November, 1944, Meyer filed in the Circuit Court of Appeals a motion that the appeal be stayed or, in the alternative, that the proceedings be remanded to the District Court (R. 5287-5493). The Court set the motion for hearing in connection with the hearing on the merits (R. 5553). The case was argued on April 6 and 7, 1945. Decision was rendered by the Circuit Court of Appeals on August 26, 1946, affirming, except for one point not here material, the order of the District Court denying the motion to remand (R. 5559-5680). Petitions for rehearing were filed, and denied on October 22, 1946 (R. 5831).

The Circuit Court devoted a large part of its opinion to Meyer's charges. It summarized them thus (R. 5577-5578):

"(1) *Validity of the Valuation when Made.* The validity of the valuation of the Commission at the

time it was made is challenged upon four general grounds as follows. First, it is contended that, during such period, there was diversion of freight from Debtor causing revenue loss to it, by other railroads controlling Debtor. Second, it is contended that, during this period, certain kinds of freight were forced upon Debtor by a controlling railroad (Pacific) and from carriage of which, Debtor suffered loss in revenue. Third, it is contended that during the period, there was wastage of Debtor's assets by a controlling railroad.[3] Fourth, that there was a continuing conspiracy by those controlling Debtor to use Debtor for their selfish purposes to its harm."

As to the charge of diversion of traffic the Circuit Court carefully reviewed and rejected Meyer's contentions as is shown by the following excerpt from its opinion (R. 5587-5588, 5627):

"Our immediate concern is whether the showing before the Commission justified its determination that no improper material diversions of traffic resulted from such controls of Debtor occurred. In determining this matter, we act under definite limitations. We cannot, as would a court in an equity suit, take the evidence before the Commission and declare an opposite conclusion if, in our judgment, the weight of the evidence was against the determination of the Commission. The Commission is the agency selected by the Congress to determine such fact matters. If there is substantial support in the evidence for its determination, we must accept it as settled (*Reconstruction Finance Corporation, et al. v. The Denver & Rio Grande Western R. Co.*, ... U.S. .... (June 10,

3. This charge related to a period prior to Respondent's acquisition of control of Debtor.

1946); *Ecker, et al. v. Western Pacific R. Co., et al.*, 318 U.S. 448, 473, 512).

Our examination involves, of course, a test comparison of the various essential fact statements of the Commission with the evidence bearing upon each material statement to ascertain whether there is substantial support for the finding in the evidence or the action of the Commission was arbitrary. Considering the great number of separately advanced particulars in each of which Mr. Meyer urges positive proof of diversion and the several thousand pages of evidence involved, these testing comparisons have required an enormous burden of reading, study and classification of the evidence. This burden has in no respect or particular been avoided. We have reached the conclusion that the results stated by the Commission are in every instance supported by substantial evidence and, therefore, the capitalization value of the Debtor as determined by the Commission must be sustained as of the time it was announced and, by supplemental report, later affirmed.

In the footnote, is set out most, but not all, of the discussion by the Commission in its report and supplemental report on this subject of diversion of traffic by the four controllers of Debtor up to the filing of the supplemental report on March 9, 1942, on a submission as of October 8, 1941. We adopt this method of presentation in this opinion for several reasons. These extracts show the care, thoroughness and detail with which the Commission examined every one of the numerous matters bearing upon traffic diversion urged by Mr. Meyer. They show the great variety of elements presented and the complexity of the entire contention. When the character of our examination—to test the evidence to determine whether

the findings of the Commission have substantial support therein—is considered and in view of our determination that there is such support, we think these extracts show ample reason why an unduly long and involved opinion treating separately each of these elements is not called for. In many instances, there was conflict in the evidence which the Commission might have ruled either way but such conflicts are for it, with its greater expert training and experience, to resolve and not for us. In other instances, suspicion, inference and possibility appeared in place of evidence of diversion."

On the question of unprofitable traffic the Court found (R. 5630):

"Statements in the report of the Commission are as set forth in the footnote. The conclusion of the Commission is that this traffic was carried at a small profit. The evidence is conflicting and we find there is material evidence supporting the conclusion of the Commission."

Finally, as to the question of conspiracy, the Court found (R. 5639-5640):

"The basis of Mr. Meyer's position in this entire controversy is a series of conspiracies by those successively in stock control of Debtor to its detriment. That there were opportunities, through these controls, for some or all of such conspiracies seems evident. The Commission, in its report, devoted much consideration to this subject. It concluded, correctly we think, that the existence of such conspiracies was material in this reorganization proceeding only as the effect thereof bore upon the earnings and assets of Debtor. If the net earnings were reduced thereby

or if a recovery of damages resulting from illegal conspiracies—anti-trust damages—such matters would affect the valuation for reorganization capitalization purposes.

Mr. Meyer has endeavored to show the actual harmful effects through diversion of traffic and the other respects which we have heretofore considered. The Commission found against Mr. Meyer in all of these matters and we have determined hereinbefore that there was material evidence to sustain such findings."

SUMMARY OF ARGUMENT

I.

The refusal of the Court below to grant an independent review of the Commission's findings of fact with respect to Petitioner's contentions is not contrary to decisions of this Court. Petitioner's charge, that Debtor's past earnings upon which the Commission's valuation was based had been impaired by illegal acts of Respondent and others, so that the valuation was unduly low, relates to a matter of valuation. It is settled by decisions of this Court that the Commission's findings with respect to valuation matters are binding if supported by substantial evidence. *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 472-473; *Group of Investors v. Milwaukee R. Co.*, 318 U.S. 523, 541-542; *Reconstruction Finance Corp. v. Denver & R.G.W. R. Co.*, 90 L. Ed. 1134, 1140-1141. Petitioner's further contention that Respondent's claim should be expunged was not open to review at all, as the lower courts held, because of Petitioner's failure to interpose objections to the claim when it was filed with the District Court and

allowed after trial of objections by others. The allowance of the claim was a judgment *in rem* binding all interested parties (*Gardner v. State of New Jersey,* No. 92 this term, January 20, 1947), and could not be collaterally attacked by Petitioner in the proceedings to review the Commission's plan of reorganization. Nevertheless, the lower courts did, in effect, review the Commission's findings with respect to this charge, to see if they were supported by substantial evidence, since both charges were based on the same facts, and in reviewing the facts as to the valuation contention the lower courts necessarily reviewed the facts with respect to the validity of Respondent's claim. Since the facts with respect to both charges were identical, and the need for free play of the Commission's expertise in technical transportation problems was the same with respect to both charges, the decisions of this Court limiting judicial review of the Commission's findings on valuation matters are equally applicable to restrict review of the findings with respect to the validity of Respondent's claim. The fact that the District Court was empowered to, and did take additional evidence, does not expand the scope of its review over the Commission's findings of fact. *Ecker v. Western Pacific R. Corp., supra,* 477. Nevertheless, the evidence taken was considered, although it was actually either improperly admitted or immaterial, and therefore could properly be disregarded.

II.

No reviewable question is presented in respect of adequacy of investigation by the Commission or the District Court. Whether and to what extent investigations shall

be conducted are administrative questions for the Commission within its discretion and not subject to judicial review (*State of North Carolina v. United States* (D.C.E.D. N.C.), 56 Supp. 606, 617. But the Commission was not lax in its duty to investigate. It caused an investigation of certain of Meyer's charges of diversion of traffic to be held, the results of which were introduced into the record. Petitioner was given the greatest latitude to prove his charges at extensive hearings, and was given access to the files of the Debtor and to its correspondence with many other railroads. The District Court likewise conducted a thorough investigation through the trustee. In his report the trustee recites that he gave Petitioner a full opportunity to present his charges. Petitioner took no exception to these reports and made no motion in the District Court for any other investigation by the trustee. In the absence of any ruling by the Court upon which there was a ruling adverse to the Petitioner, there is nothing for the consideration of this Court. *McCullough v. Kammerer Corp.*, 323 U.S. 327.

III.

The Circuit Court was correct in denying Petitioner's motion to remand and its action is not contrary to decisions of this Court. Insofar as the motion was based on the bringing of an antitrust suit by the Government against all the major western railroads, including Debtor, subsequent to the trial below, the motion was properly dismissed because the suit would not have any effect upon the decision in the instant case and is of very doubtful relevance. Insofar as the motion was based upon the "Western Agreement" between various western railroads,

as set forth in the complaint in the above antitrust suit, it was also properly denied. The motion was filed after expiration of the appeal time and therefore was not timely. In addition, the agreement was not newly discovered evidence. Petitioner had long known of it, since he had voted in favor of Debtor's adhering to it, and also voted for the appointment of Debtor's representative to administer the plan provided by the agreement. Decisions of this Court requiring the independent judgment of the court in bankruptcy proceedings, regardless of parties' actions, are not applicable here where the proceedings were clearly adversary in nature. It would have been unfair to other litigants to have excused Petitioner from compliance with fundamental procedural principles generally applicable. Furthermore, the Western Agreement was not evidence which would have forced a different result in the event of a rehearing, since the agreement was adopted by the parties for their mutual benefit to conserve their revenues.

IV.

Judge Moore's refusal to grant a new trial after the death of Judge Davis was not a departure from the usual course of judicial proceedings and raised no important federal question. In view of the fact that the scope of the Court's review of the Commission's findings was limited to the legal question of the existence of substantial supporting evidence, the situation is precisely comparable to that where a judge is called upon to rule upon a motion for a new trial of a case heard by a deceased predecessor because the decision is not supported by substantial evidence. In the latter situation it has long been recognized

that the fact that the successor judge has not had an opportunity to observe the witnesses is unimportant, and that he may rule on the motion. *New York Life & Fire Insurance Co. v. Wilson*, 8 Pet. 291, 303. The same rule is applicable here to permit a successor judge to decide the case without granting a new trial. Failure to apply this rule would lead to great delay, which is contrary to the need for expedition. That was a principal reason for the enactment of Section 77. In any event, Petitioner was not injured by the refusal to grant a new trial, since he was given an opportunity to move for the taking of any additional evidence before Judge Moore, but never availed himself of this opportunity.

ARGUMENT

POINT I

The District and Circuit Court's Determination that the Commission's Findings with Respect to Petitioner's Charges of Misconduct with Respect to Debtor by Respondent and Others Were Binding if Supported by Substantial Evidence Was Not in Conflict with Decisions of This Court.[4]

Petitioner, as pointed out in the Statement, made two principal charges before the Commission and the lower courts, now reiterated here: (1) that Debtor's earnings during the period from 1927 to 1941, upon which the Commission's valuation was based, were impaired because of alleged illegal acts with respect to Debtor by Respondent and others, thus making the prescribed valuation unduly low; (2) that Respondent's claim should be expunged or

4. This heading relates to Point I of Petitioner's argument (brief, p. 26) and to question 2 of his petition (petition, p. 16).

at least subordinated because of its alleged illegal acts with respect to Debtor. As we have seen, the Commission, after exhaustive hearings on these charges, made detailed findings of fact upon which it concluded they were without foundation. Both the District Court and the Circuit Court concluded that these findings were binding if supported by substantial evidence, denying an independent review in the sense that they refused to weigh the evidence taken before the Commission. Both Courts concluded that the Commission's findings were supported by substantial evidence. Petitioner complains of this failure of the Courts to weigh independently the evidence taken before the Commission.

Petitioner's first charge relates obviously to a matter of valuation. This Court has, as the Circuit Court recognized (R. 5587-5588), in unmistakable language on three occasions, held that all valuation matters are primarily for the Commission and that the judicial function of review does not extend to weighing the evidence but only to ascertaining whether the Commission's findings are supported by substantial evidence, and whether it has followed proper legal standards. *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 472-473; *Group of Investors v. Milwaukee R. Co.*, 318 U.S. 523, 541-542; *Reconstruction Finance Corp. v. Denver & R.G.W. R. Co.*, 90 L. Ed. 1134, 1140-1141. In the case first cited this Court declared (318 U.S. 448, 472-473):

> "The power of the court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court. The first sentence of the last paragraph of subsection (e) provides:

> 'If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan.'
>
> The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible. Judicial reexamination was not considered desirable. None of the findings required of the judge under subsection (e) relate specifically to valuation. Congress aparently intended to leave the determination of valuation 'of any property for any purpose under this section' to the Commission. The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards.''

Plainly, instead of the Circuit Court's action being contrary to these decisions, as Petitioner contends (Pet. pg. 20), it was expressly required by them.

Petitioner's argument that he was entitled to an independent judicial review at this stage of the proceedings of his other contention that Respondent's claim should be expunged is equally without substance.

The District Court concluded (supra pg. 16), that the validity of Respondent's claim was "no longer open to question" (R. 5199). It reached this conclusion on the ground that Petitioner had failed to exercise the opportunity given him to file objections to Respondent's claim in accordance with the procedure prescribed by the Court under 11 U.S.C., sec. 205(c) (7),[5] and on the ground that an objection duly filed by certain of Debtor's foreign bondholders to Respondent's claim had been overruled by the Court after extensive hearing and the claim allowed. The attack upon Respondent's claim by the foreign bondholders was similar to that made by Petitioner, since they charged that the claim should be expunged or subordinated because of alleged mismanagement of Debtor by Respondent (R. 3982, 3996, 3998). The Circuit Court apparently also took the view that the question of the validity of Respondent's claim was no longer open to question since it treated Petitioner's contentions of illegal conduct by Respondent and others as going only to the validity of the valuation when made (R. 5575-5578). It did deal with a contention by the United States as *amicus curiae* that Respondent's claim should be expunged (R. 5640-5645).[6]

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5. This section provides in part:
"The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced, and after which no claim not so filed or evidenced may participate, except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed. . . ."

6. The Government, whose appearance was described by the Court as "smacking of inspiration" (R. 5645) had advanced the argument that Respondent's claim should be expunged because of its failure to cause the Debtor to bring a treble damage suit under the anti-trust laws against Kansas City Southern Railroad,

The Courts below were clearly correct in this position. It is settled that an order of a bankruptcy court allowing a claim is a judgment *in rem* binding all interested parties, whether or not they personally objected to the claim. *Wheeler v. Smith* (C.C.A. 9), 30 F.(2d) 59, 61; *In re Hawkins Mortgage Co.* (C.C.A. 7), 66 F.(2d) 16, 18, certiorari denied, 291 U.S. 659; *Gardner v. State of New Jersey* (No. 92 this term, decided January 20, 1947. In the *Gardner* case this Court declared (pg. 6):

> "A proof of claim is, of course, *prima facie* evidence of its validity. *Whitney v. Dresser,* 200 U.S. 532. But the bankruptcy court whose aid is sought for enforcement of an asserted claim is not bound to treat the tendered proof as conclusive. When objections are made, it is duty bound to pass on them. That process is, indeed, of basic importance in the administration of a bankruptcy estate whether the objective be liquidation or reorganization.
>
> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure . . . The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res.* It is none the less such because the claim is rejected *in toto,* reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash."

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which, it was alleged, had earlier controlled Debtor illegally. The Circuit Court rejected this contention because it concurred in the Commission's finding that Debtor had not been injured by such control and hence that there was no probability of the existence of a cause of action under the antitrust laws (R. 5645). It is highly significant that the Government, which, of course, has the primary responsibility of enforcing the antitrust laws, never brought any action under those laws against the Kansas City Southern.

The only remedy which an interested party may have in respect of a claim which has been allowed by a bankruptcy court, is to move for a reconsideration of the order allowing the claim in accordance with 11 U.S.C. Sec. 93(k), which provides:

> (k) Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

Presumably this section is made applicable to Section 77 proceedings by 11 U.S.C. Sec. 205(1).[7] But this procedure is the exclusive method provided for the review of claims which have been allowed. *In re Hochman* (D.C.E.D. N.Y.) 57 F. Supp. 312, 313; *In re L. H. Seifer & Sons, Inc.* (C.C.A. 7), 78 F.(2d) 196, certiorari denied, 296 U.S. 618; *In re Roanoke Furnace Co.* (D.C.E.D. Pa.), 152 Fed. 846. An order allowing a claim in bankruptcy cannot be attacked collaterally. *Wheeler v. Smith, supra; In re Hawkins Mortgage Co., supra; Seemann v. National Bank of Commerce of Houston* (C.C.A. 5), 112 F.(2d) 378, 380; *In re Roanoke Furnace Co., supra; Sampsell v. Imperial Paper Corp.,* 313 U.S. 215, 219. Petitioner chose neither to file an original objection to Respondent's claim, nor to pursue the remedy of a petition for reconsideration. Instead he resorted to a collateral attack on the order allowing the

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7. This paragraph provides:
"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

claim in the proceedings before the Commission and the Court to work out and approve the plan. Clearly such a collateral attack cannot be maintained. It would be intolerable if a creditor, after proving its claim upon a lengthy trial, should be required to prove its claim subsequently, solely because a stockholder chose not to file his objections within the time fixed by the Court for their filing. The procedure for the proving of claims is set up to provide an orderly and reasonably expeditious method of having such matters determined. For a stockholder to refuse to follow such procedure and to insist upon the retrial of a claim which had been previously allowed, would be inconsistent with the expedition in Section 77 proceedings which this Court has held to be desirable. *Continental Bank v. Rock Island Ry.*, 294 U.S. 648, 685.

But even though consideration of Petitioner's contention that Respondent's claim should be expunged is thus completely foreclosed, it is evident that the District and Circuit Court did, in effect, review it to see whether the Commission's findings rejecting it were supported by substantial evidence. This is because the facts relied upon to support both Petitioner's contentions, that the valuation was based on earnings impaired by illegal acts, and that Respondent's claim should be expunged because of its illegal acts, were virtually identical. Petitioner, himself, admits this in his brief (pg. 34). He states there:

> "Any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the two issues would be purely academic as all of the proof relevant to the issue as to whether debtor's earnings were illegally impaired is also relevant to the issue as to whether Southern Pacific's claim should be subordinated or expunged."

Necessarily, then, in passing upon the substantiality of the evidence as to Petitioner's valuation contention, the lower courts passed upon the substantiality of the evidence relating to his contention with respect to Respondent's claim.

Also, since the facts relating to this latter contention are identical with those relating to the valuation contention, the aforementioned decisions of this Court, limiting the scope of review to the question of the existence of substantial evidence in the valuation field (*supra,* pg. 26) are equally applicable with respect to review of the Commission's findings on this latter contention. The same complicated and technical transportation problems requiring judicial abnegation in order to give free play to the Commission's expertise (*Rochester Telephone Corp. v. United States,* 307 U.S. 125, 138-140), are applicable in both instances. As indicated above, Petitioner admits that "any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the two issues would be purely academic." With this we agree. Furthermore, virtually the only place where findings of fact of an administrative body will receive an independent judicial review is in the narrow field where the facts are "constitutional facts," the constitutionality of the administrative action depending upon the determination of a factual issue. *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U.S. 287; *Crowell v. Benson,* 285 U.S. 22; *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38; *Baltimore & Ohio R. Co. v. United States,* 298 U.S. 349. Cf. *Transamerican Freight Lines v. United States* (D.C. Del.), 51 F. Supp. 405, 409. Certainly Petitioner has no constitutional right to have Respondent's

claim expunged which is contingent upon the Commission's determination of factual issues.

Petitioner might have secured the independent judicial determination of the validity of Respondent's claim which he now seeks, if he had followed the orderly procedure, considered above, of objecting before the Court when this claim was presented for allowance. Having failed to do so, and having, instead, sought to try the issue in the first instance before the Commission, he cannot now be heard to complain that the reviewing court erred in applying the customary rule of "administrative finality" to the Commission's determinations of fact.

The fact that the District Court is empowered to, and did, in the present case, take additional evidence, does not expand the scope of its review over the Commission's findings of fact on issues of valuation, and kindred issues such as are here presented. This was plainly recognized by this Court in *Ecker v. Western Pacific R. Corp., supra,* 477, where it was said:

> "Thus, while judicial review does not involve an independent examination into valuation, it does require that the Court shall be satisfied, upon the record before the Commission, with such additional evidence as may be pertinent to the objections to the Commission's findings of value, that the statutory requirements have been followed."

Petitioner's statement that the evidence introduced by him before the District Court was not considered by either the District Court or the Circuit Court (brief, pg. 32), is without foundation. This is shown by the following statement of the District Court in its opinion (R. 5202):

> "We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of the various allegations and objections . . . He has not convinced either this Court or the Commission that his charges are well founded."

The Circuit Court also mentioned the fact that evidence was taken before the District Court (R. 5569) and thus, in the absence of anything to the contrary, such evidence in the record must be presumed to have been considered by it.

In fact, however, all the evidence taken before the District Court with respect to Petitioner's charges was either improperly introduced or else immaterial and hence could properly be disregarded. Judge Davis, at the beginning of the trial, ruled that the testimony before him would be restricted to the period occurring subsequent to the consideration of the plan by the Commission (R. 4186). Petitioner does not attack this order, which was plainly in accord with the usual practice in cases of judicial review of administrative proceedings. *National Broadcasting Co. v. United States,* 319 U.S. 190, 227. Nevertheless, considerable documentary evidence relating to the period prior to that time was introduced by Petitioner (R. 5569). Such evidence was introduced in violation of the Court's order, and could properly be disregarded. Insofar as Petitioner's evidence related to the period subsequent to the Commission's consideration of the case, it was not material with respect to any of the contentions made by Petitioner below and in this Court. Obviously, evidence relating to the Debtor's situation during the period subsequent to the Commission's decision would not be ma-

terial on the issue as to whether its earnings were depressed during the earlier period considered by the Commission. On the issue of expunging Respondent's claim such evidence was equally immaterial since all such evidence related to a period subsequent to the commencement of the bankruptcy proceedings. Yet, it has been held time and again that the rights of creditors are fixed, both as to the bankrupt and between themselves, as of the date of filing the petition in bankruptcy. *United States v. Marxen,* 307 U.S. 200, 207; *Sexton v. Dreyfus,* 219 U.S. 339, 344; *White v. Stump,* 266 U.S. 310, 313. Seasonable objection was made by Respondent to the taking of this evidence (R. 4328, 4333).

It is evident that Petitioner's real aim is to have this Court reconsider in minute detail the great volume of conflicting evidence which has failed to convince the Commission and two lower courts that the facts were as petitioner alleges. The only dispute is as to the facts, since Respondent has never denied its legal duty to Debtor and its minority stockholders under such cases as *Taylor v. Standard Gas & Electric Co.,* 306 U.S. 307. And the Commission correctly stated and applied the legal and equitable standards by which the conduct of Respondent, as a majority stockholder, should be judged (R. 3640, 3669, 3670). Aside from the Herculean nature of such a task, it is evident that such factual questions, while of importance to Petitioner, are not of such general importance as to warrant review by this Court.

POINT II

No Reviewable Question Is Presented in Respect of Adequacy of Investigations by the Commission or the District Court.[8]

Insofar as the alleged failure of the Commission to conduct an investigation is concerned, it is a sufficient answer to the Petitioner to point out that the question whether the Commission should institute an investigation under Sec. 12 of the Interstate Commerce Act (49 U.S.C. Sec. 12) is an administrative one within its sole discretion and not subject to judicial review. Section 12 of the Interstate Commerce Act gives the Commission the authority to inquire into the management of the business of common carriers and to keep itself informed as to the manner and method in which such business is conducted. As a result of such investigations it may make recommendations to Congress. It is made the duty of any district attorney of the United States, under the direction of the Attorney General, to prosecute violations of Part I of the Interstate Commerce Act which may be brought to light in such investigations. Clearly, in conducting such an investigation the Commission is performing a legislative or administrative act. No right capable of judicial enforcement is vested in any individual. Moreover, where, by other sections of the Interstate Commerce Act, Section 13 (49 U.S.C. Sec. 13), for instance, the Commission is directed to conduct investigations of certain character upon the complaint of specified parties, decision as to whether or not the investigation will be made is within the Commission's discretion. *State of North Carolina v. United States* (D.C., E.D., North Caro-

8. This heading relates to Point II of argument in Meyer's brief, pages 37-42, and to question 3, page 17 of his petition.

lina), 56 F. Supp. 606, 617 (reversed on other grounds, *North Carolina v. United States,* 325 U.S. 507); *Labor Board v. I. & M. Electric Co.,* 318 U.S. 9, 18.

But we cannot permit the accusation that the Commission was lax in the performance of its duties to go unchallenged. Initially, the Commission did cause an investigation of Meyer's charges of alleged diversion of business from the Debtor by Kansas City Southern Railway Company and other southwestern carriers during the years 1927, 1928 and 1929, which resulted in the Boyd Report to the Commission, in which the conclusion was reached that no proof of diversion of traffic had been found (R. 3601-3602). This report occupied approximately eleven months of the time of a special agent of the Commission (R. 3600). Meyer filed a petition and a supplemental petition with the Commission, in which he asked both for an investigation and for an opportunity to introduce, himself, evidence in support of his charges (R. 339-351, 357-432). The proceeding was reopened by the Commission and Meyer given an opportunity to introduce any relevant testimony (R. 501). Meyer was given the greatest latitude in the ensuing hearings, which took from May 5 to May 27 and from September 18 to September 30, 1939. He made application for a subpoena *duces tecum* for the production of records by Respondent. Many of the matters requested were produced (R. 1598, 1600, 1604, 1605). Some of the requests were rejected as unreasonable (R. 3672-3674). Meyer was permitted to amend his application for a *duces tecum* subpoena (R. 1621, 1661), but did not do so. He was given access to the files of the Debtor and to its correspondence with Respondent and many other railroads (R. 3549, 3674-3675). The care with

which the Commission dealt with Meyer's claims is evidenced by the fact that 131 pages of its first report (R. 3547-3678) and ten pages of its supplemental report (R. 3742-3752) are devoted to discussion of them. It concluded (R. 3675):

> "We are of the view that Meyer has had a full and fair opportunity to obtain and present evidence in support of his charges, and that such charges have been sufficiently investigated. The request for a reopening of the proceeding is denied."

And again (R. 3747):

> "The petitioner's charge that he was not afforded a fair opportunity to prove his case was sufficiently discussed in our prior report. We adhere to our former determination on this point."

The impressive thing about this case is the care with which Meyer's claims have been examined.

Little need be said about Meyer's claim that the District Court did not investigate his charges. In accordance with the provisions of Section 77 of the Bankruptcy Act, 11 U.S.C. Sec. 205(c)(9), the District Court directed the trustee to report as to any irregularities, misconduct or mismanagement (R. 3903). The trustee made reports in which he advised that, upon investigation, he found no evidence of misconduct or mismanagement (R. 3903-3951). The trustee's report of February 23, 1937, recites (R. 3906-3907):

> "Immediately following the Trustee's appointment, he had numerous conferences with Walter E. Meyer, a stockholder of St. Louis Southwestern Railway Company, and gave Mr. Meyer full opportunity to present informally a summation of the alleged facts

> which he contends resulted in the existence of causes of action in favor of the principal Debtor, as well as a large number of written statements and other documents relating thereto, including briefs filed in court and Interstate Commerce Commission proceedings hereinafter referred to."

Meyer took no exceptions to these reports and made no motion in the District Court for any other investigation by the trustee. Indeed, the District Court states in its opinion, "We do not understand that Meyer accuses the trustee of any bad faith or lack of diligence" (R. 5202). In the absence of any objection or motion in the District Court upon which there was a ruling adverse to the Petitioner, there is nothing for the consideration of this Court. *McCullough v. Kammerer Corp.*, 323 U.S. 327.

POINT III

The Circuit Court of Appeals Was Correct in Denying the Petitioner's Motion to Remand and Its Action Is Not Contrary to Decisions of This Court.[9]

Meyer filed a motion in the Circuit Court of Appeals in November, 1944, requesting that the appeals be stayed or, in the alternative, that the proceedings be remanded to the District Court (R. 5287-5493). A reply and a memorandum in opposition were filed, respectively, by Respondent (R. 5495-5514) and by Chase National Bank and other appellees (R. 5515-5533). The motion was set for hearing by the Court in connection with the hearing upon the merits of the appeals (R. 5553) and was denied in the Court's opinion rendered August 26, 1946 (R. 5569-5573).

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9. This Point III relates to Meyer's 4th question, page 18, his petition, and to Point III of his argument, pages 42 to 47, his brief.

To the extent that the motion is based upon the improved financial position of the Debtor it goes to the merits of the case which will be before this Court if the petitions for certiorari by the Debtor and Respondent are granted herein. In its other aspects the motion was not well founded, as the Circuit Court of Appeals found.

Meyer argues, page 44 of his brief, that the cause should have been remanded because his motion revealed (a) new developments, viz., a suit by the Government against all major western railroads to enjoin acts alleged to be contrary to the antitrust laws, and (b) facts (principally the execution by Western railroads of the "Western Agreement") existing prior to the trial in the District Court but newly discovered by Meyer from the complaint in the Government's antitrust suit.

The suit by the Government was a development occurring after the trial below. Such a development may be brought to the attention of an appellate court in any appropriate manner (*Walling v. Reuter Co.*, 321 U.S. 671, 676; 12 *Cyc. Fed. Proc.* Sec. 6268, p. 417), but to warrant the case's being remanded, it would have to appear clearly that the existence of the new development would change the result below (*Institutional Investors v. Chicago M., St. P. & P.R. Co., supra*), and Meyer, as the moving party, would have to demonstrate that fact. Actually, the suit would not have any effect upon the decision and is of very doubtful relevancy. The outcome of the antitrust suit will not be known for a long time,[10] and whether it will affect

10. Two years after the motion was made the suit has still not been brought to trial. To hold up the present case pending the outcome of that suit would not be in keeping with the expedition considered desirable in Section 77 proceedings. *Continental Bank v. Rock Island, supra,* 685.

the fortunes of the Debtor is problematic. The Department of Justice may conceive that the ultimate sustaining of its contentions will benefit shippers and the public generally, but it is doubtful, to say the least, that such a result would benefit Debtor, one of the defendants in the suit; nor would it affect control of the Debtor by Respondent, which is not involved in the suit and which was approved by the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act in *St. Louis S. W. Ry. Co. Control,* 180 I.C.C. 175. Meyer suggests, on page 46 of his brief, that if the Government should win this suit, the Debtor might benefit because it would lose the perishable traffic from the West Coast which it is now able to handle, despite a longer route, under agreed schedules. He bases his statement upon his assertion that the perishable traffic is unprofitable. But the Comptroller of the Debtor determined from a study made by him that some profit was realized from the traffic (R. 1673-1680), and the Commission accepted this view (R. 3637). The Debtor prior to the trusteeship, and the trustee appointed by the Court thereafter, have actively solicited for the perishable traffic. Also, the break-down of schedule agreements would handicap the Debtor in competing for other West Coast business. Thus, the development anticipated by Meyer from the antitrust suit would harm, and not benefit, the Debtor. Meyer states, further, that if the defendant railroads lost the antitrust suit, Respondent would not have inducement to withhold traffic aid from the Debtor. His reasoning is obscure and the premise is faulty, since the Commission has found that Respondent has consistently aided the Debtor in traffic matters to the extent required (R. 3669, 3670).

The "Western Agreement," set forth in the Government's complaint in the antitrust suit, is not a new development, since it became effective on December 1, 1932 (R. 5426), and was cancelled on April 23, 1943 (R. 5414). For the "Western Agreement" to be a basis for remanding the case by the appellate court to the District Court for a new trial, three conditions would have to exist: A motion for a new trial in the District Court would have to be timely, the evidence would have to be newly discovered, and the evidence would have to be of such weight and importance as to indicate that a rehearing would probably produce a different result.

A motion for a new trial in the District Court on the ground of newly discovered evidence must be filed before the expiration of the time for an appeal. Rule 59(b), *Rules of Civil Procedure for the District Courts of the United States.* A motion filed after that time may not be considered even though an appeal was taken. *Checker Cab Co. Inc. v. Markland* (App. D.C.), 142 F.(2d) 95. The time for filing an appeal from the judgment below had long since expired when Meyer filed his motion for remand.

Although Meyer alleged in his motion that the "Western Agreement" was "newly discovered evidence" (R. 5289, 5320), these allegations were not correct. It appears in the record, without dispute, that Meyer had known of the "Western Agreement" for many years, since he, as a member of the Board of Directors of the Debtor, voted for the approval of that agreement by that Company in July, 1932 (R. 5502-5503), later voted for the appointment of a representative of the Debtor to administer the Commissioner plan provided by the "Western Agreement" (R. 5503-5504), and introduced an exhibit concerning it at the Com-

mission's hearings (R. 937-939). He now says that he did not fully appreciate the character of the "Western Agreement." It is settled law that the subsequent discovery of the importance of evidence which was in the possession of a party at the time of the trial does not entitle him to a new trial upon the ground of newly discovered evidence. *United States v. Bransen* (C.C.A. 9), 142 F.(2d) 232, 235; 39 *Am. Jur.* 166.

This is an adversary proceeding in which Meyer is seeking to subordinate the debt owing Respondent to his stock interest, and, in fairness to the other litigants in the case, he cannot be excused from procedural principles generally applicable. A litigant must be bound by time limitations applicable to others in the case and may not be excused from the reasonable requirement that he must produce his evidence at the time of trial. The decisions of this Court requiring a bankruptcy court's independent judgment, regardless of the acts of the parties, to which Petitioner asserts this Court's action was contrary (brief pg. 46), involved situations where third parties stood to be injured by the consent action of other parties not adversaries of each other. They are inapplicable here.

Moreover, if all procedural matters are brushed aside, the "Western Agreement" still does not provide any reason for interfering with the judgment below. The "Western Agreement" was adopted by practically all railroads operating west of the Mississippi, for the purpose of aiding such railroads who were parties to it, through the conservation of their revenues. It recites that it was for the mutual benefit of the parties, of which the Debtor was one (R. 5428). Commissioner Eastman testified concerning the "Western Agreement" before the Senate Committee on

Interstate Commerce, at the hearings on S. 942 78th Congress, 1st Session (pgs. 831-834) (R. 5507-5508), as follows:

> "It [the Commissioner plan of the 'Western Agreement'] was designed to put a brake upon competitive waste and extravagance, although it was so drawn that it did not in the last analysis debar carriers from individual action. I sympathized with the idea which this plan undertook to implement. My impression, however, is that it was never particularly effective, and now seems to be on its way out. That it had no sinister purpose I am convinced. There never was any secret about it, although it appears that a copy of the agreement was not filed with the Commission, as probably should have been done. You will find that the railroads were enjoined in the Emergency Act of 1933 to create committees and to bring about these eliminations of wasteful competition."

If the fact that the "Western Agreement" was in existence from 1932 to 1943 is relevant in the reorganizations of the parties thereto, it has been overlooked in the reorganization of every one of the western railroads which have resorted to Section 77 of the Bankruptcy Act.

POINT IV

Judge Moore's Refusal to Grant Petitioner a New Trial on the Death of Judge Davis, Who Had Originally Heard the Case, Was Not a Departure from the Usual Course of Judicial Proceedings Warranting an Exercise of This Court's Supervision and No Important Federal Question Is Raised by This Action.[11]

Judge Moore's action in refusing Petitioner a new trial on the death of Judge Davis, who had originally heard the case, and in, instead, considering the case on a transcript of the record made before the Commission and Judge Davis, was not, as Petitioner urges, a departure from the usual course of judicial proceedings.

Admittedly, in the usual judicial proceedings where the court conducts a trial *de novo* and makes its own findings of fact the weight of authority is to the effect that the death of the judge who has heard the evidence before he has made findings of fact requires a new trial. *Worden v. Alexander,* 108 Mont. 208, 90 P.(2d) 160, 161. On the other hand, it has been equally well settled since the days of John Marshall that in the federal courts a successor judge not participating in the hearing may rule on a motion for new trial. *New York Life & Fire Insurance Co. v. Wilson,* 8 Pet. 291, 303; *Meldrum v. United States* (C.C.A. 9), 151 Fed. 177, 182; *King v. United States* (C.C.A. 6), 25 F.(2d) 242, 244. As the Supreme Court put it in the case first cited:

> "But the district judge is mistaken, in supposing that no one but the judge who renders the judgment, can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right

11. This heading relates to Point IV of Petitioner's argument (brief, p. 47) and to question 1 of his petition (petition, p. 16).

> to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

This is also the rule by the weight of authority in the state courts. *People ex rel. Hambel v. McConnell,* 155 Ill. 192, 40 N.E. 608, 610. Likewise it is clear that a successor judge has power to pass upon a reserved motion for a directed verdict. *Thomas-Bonner Co. v. Hooven, Owens & Rentscheler Co.* (C.C.A. 6), 284 Fed. 386, 392-393; *Cahill v. Mayflower Bus Lines* (C.C.A. 2), 77 F.(2d) 838, 839.

The principal reason cited by the cases for refusing to let a new judge decide the facts in a case upon a record made before a deceased predecessor is that he has had no opportunity to see and hear the witnesses. Some of the decisions which have authorized a successor judge to hear a motion for new trial have deprecated this factor there on the ground that the successor judge should attach the same weight as an appellate court would to his predecessor's findings of fact and should not grant a new trial unless there is clearly no reasonable support in the evidence for his predecessor's findings. *People ex rel. Hambel v. McConnell, supra,* 40 N.E. 608, 610; *Gibson v. Morris State Bank,* 49 Mont. 60, 71, 140 Pac. 76, 79. In applying this power, as thus limited, the judge is merely passing on a question of law, the legal sufficiency of the evidence, rather than one of fact (*Potter v. Great Northern Ry.,* 167 Minn. 168, 208 N.W. 641), and the real reason for granting him this power while denying him the right to decide the facts in the first instance is finally apparent.

When this real reason for these different rules is fully appreciated, it is plain that, as the Circuit Court correctly ruled (R. 5568), the successor judge's position in reviewing and approving a reorganization plan proposed by the Commission is comparable to that of a successor judge in passing upon a motion for new trial based on insufficiency of the evidence to support the verdict. As pointed out in Point I of the Argument, he is in such a case entitled only to pass upon the question of whether there is substantial evidence in the record before the Commission to support its findings of fact, notwithstanding the fact that he is permitted to take additional evidence. This is precisely the same question of law, rather than of fact (*Reconstruction Finance Corporation v. Bankers Trust Co.*, 318 U.S. 163, 170), to which, under the above better rule, a successor judge must limit himself in deciding a motion for a new trial, based on insufficiency of the evidence. Plainly, in both such situations it is of no importance that the successor has not seen or heard the witnesses, which factor, as we have seen, is the reason for denying the successor power to decide the usual case in the first instance on the record made by his predecessor. Manifestly, the rule applicable to new trials should be held applicable here.

Rule 63 of the Federal Rules of Civil Procedure does not indicate a different result. This rule provides:

> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the

> court in which the action was tried may perform those duties, but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

From this it might be urged that where the deceased judge, as here, had not entered findings of fact, his successor could not in his discretion proceed without granting a new trial.

But this rule must be read in connection with Rule 52, which requires courts to make findings of fact and conclusions of law "in all actions tried upon the facts without a jury." It must also be read in connection with Rule 81, which makes the rules applicable in bankruptcy proceedings only insofar as made to apply thereto by rules of the Supreme Court, and with Article 37 of the Supreme Court's General Orders in Bankruptcy, which requires that in bankruptcy proceedings the rules "in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be." It has been held that the provisions with respect to findings of fact do not apply to proceedings under the Bankruptcy Act where the court is merely reviewing the Commission's findings to ascertain if they are supported by substantial evidence, such as the present. *In re Chicago, M. St. P. & P. R. Co.* (C.C.A. 7), 138 F.(2d) 433, 435; certiorari denied, 321 U.S. 770. This is because in such proceedings the court does not try the facts. Inasmuch as findings of fact by the court are not contemplated in proceedings of this sort, any limitations imposed by Rule 63, contingent upon whether death of the presiding judge occurred before or after he had made findings of fact, are inoperative.

It is significant also that in numerous special proceedings such as those in surrogate courts and orphans' courts the states have permitted a successor judge greater power than in the usual case, allowing him to decide a case in the first instance on the record made before his deceased predecessor without granting a new trial. *Matter of Winslow,* 12 Misc. 254, 34 N.Y. Supp. 637; *Matter of Goldthwaite,* 125 Misc. 265, 211 N.Y. Supp. 463; *Re Nolan,* 71 N.J. Eq. 207, 63 A. 618.

A more flexible rule than that applicable to the usual judicial proceedings has also been applied to administrative proceedings. Thus, it is well settled that in the case of administrative agencies a change of personnel during the course of a hearing, so that the same officer who takes the testimony does not prepare the decision, does not invalidate the proceedings. *Eastland Co. v. Federal Communications Commission* (App. D.C.), 92 F.(2d) 467, 470, certiorari denied, 302 U.S. 735; *Twin City Milk Producers Assn. v. McNutt* (C.C.A. 8), 122 F.(2d) 564, 568-569. In railroad reorganization proceedings where the administrative body and the courts must work in unison, it is essential that the flexible rule applicable to administrative agencies should be held also to apply to courts in reviewing the action of the administrative body. When it is recalled that railroad reorganization proceedings are often shunted back and forth between the Commission and the court, it is obvious that failure to apply this same rule to the judicial phase of the proceedings will lead to even greater confusion and delay than already characterizes the railroad reorganization scene. A procedure increasing such delays would clearly be opposed to the important Congressional motive in enacting section 77 of the Bankruptcy Act, to

alleviate the delay and expense incident to railroad receiverships. *Continental Bank v. Rock Island Railway, supra,* 685.

In addition, it is evident that under the particular circumstances of the present case petitioner was not injured by Judge Moore's refusal to grant a new trial. The Circuit Court properly observed (R. 5569):

> "There was considerable oral testimony before Judge Davis, but even more documentary. Such matters as bore upon credibility arose principally from claimed differences between oral testimony and prior written statements of a witness. Such differences speak from their face and little aid in judging credibility is gained by viewing the witness."

Furthermore, for the reasons indicated in Point I, *supra,* pgs. 34-35, the testimony introduced in the District Court by Meyer was entirely improper or immaterial. Moreover, Petitioner was not injured by the denial of a new trial, because Judge Moore's order taking the case as submitted on the record made before the Commission and Judge Davis, contained a provision that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182). Yet Petitioner never filed any such motion to take additional testimony.

It is evident from the foregoing that Petitioner's present contention is so lacking in substance as to justify the conclusion that an important federal question warranting decision by this Court is not presented.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied except as to Petitioner's fifth question.

Dated: San Francisco, Calif., February 15, 1947.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the attached brief by Southern Pacific Company in opposition to petition for writ of certiorari upon all of the counsel of record by depositing same in the United States mails in San Francisco, California, with proper postage duly prepaid, this 15th day of February, 1947.

ROBERT L. PIERCE
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Of Counsel for Respondent
Southern Pacific Company.

(APPENDIX FOLLOWS)

Appendix

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) are as follows:

"(c) After approving the petition:

* * * * * * *

"(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests.

* * * * * * *

"(9) The Judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

* * * * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, * * *. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima

facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

* * * * * * *

"(e) Upon the certification of a plan by the Commission to the Court, the Court shall give due notice to all parties in interest of the time within which such parties may file with the Court their objection to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders,

does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; * * *

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. * * * If the judge shall approve the plan he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge; *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their

equity, if any, * * * *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. * * *

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the Court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 909

WALTER E. MEYER, Intervener,

Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petition for Rehearing 1

Summary:

The joint petition of the Trustee and the Debtor to the District Court, filed since the denial of certiorari herein, and the proof placed in the record in the hearings on said joint petition, show that the Debtor will be in a position as of July 1, 1947, to pay $18,331,525 of its indebtedness and still have cash or its equivalent in the amount of $8,761,879.

These facts indicate changed conditions since the formulation of the plan of reorganization by the Commission, effective January 1, 1942, calling for a new plan of reorganization.

The ability of the Debtor thus to reduce its indebtedness, with an attendant great decrease in interest charges, renders a lease by Southern Pacific of the Debtor practicable, and calls for a plan of reorganization coupled with a lease. A lease, through the savings in operation that will result, will bring increased earnings to Debtor of a million dollars per annum. It will also bring an additional increase in earnings through increased traffic.

The fact that a lease is now practicable in itself is a changed condition which necessitates a new plan of reorganization.

The foregoing facts serve to distinguish this case from *Reconstruction Fin. Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, and justify a rehearing by this Court of its order denying certiorari and the granting of certiorari.

The plan of reorganization of Debtor was formulated by the Interstate Commerce Commission and approved by the District Court and the Circuit Court of Appeals. It is now contended that changed conditions justify the dismissal of the reorganization proceedings.

There should be a determination by this Court as to whether under these circumstances it is the function of the District Court or of the Interstate Commerce Commission in a Section 77 proceeding to find whether a reorganization of a debtor is necessary.

This furnishes an additional reason for a rehearing of the order denying certiorari and the granting of the petition.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now your petitioner, WALTER E. MEYER, and moves the Court to set aside its order of March 10, 1947, denying his petition for a writ of certiorari herein, and to reconsider the petition, and in support thereof states:

I

There have been important developments since the denial of certiorari, which, it is submitted, require a reconsideration of said denial.

Petitioner in his petition to this Court set forth, among others, the following reason for the allowance of the writ:

> "7. The Circuit Court of Appeals, in holding that a new plan of reorganization of debtor was not required despite changed conditions since the formulation of the plan, including a great improvement in

assets, decrease in principal indebtedness and accrued interest, increase in net current assets, continuous and progressive improvement of earnings during the war, and large earnings during the post-war period, decided an important question of Federal law which has not been but should be determined by this Court. The facts as to the foregoing changed conditions serve to distinguish debtor's case from the *Denver & Rio Grande* case."

The Debtor and Southern Pacific Company, owner of 87.37% of the stock of Debtor and a creditor in the principal amount of $17,882,250, also filed petitions for certiorari with this Court. They, too, asked that certiorari be granted on the ground of changed conditions.

The respondents, Chase National Bank and Mississippi Valley Trust Company; the Protective Committee for the Terminal and Unifying Mortgage Bondholders; Guaranty Trust Company, Trustee under the First Terminal and Unifying Mortgage; and Chemical Bank & Trust Company, Successor Trustee under the General and Refunding Mortgage, in their briefs in opposition argued that the very large earnings of the Debtor since the formulation of the plan had been anticipated by the Commission and that the increase in net assets and in net current assets was for the benefit of the new security holders. Said respondents insisted upon their rights as bondholders and creditors to receive the securities awarded them under the Commission's plan, citing in support of their position the decisions of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523; and *Reconstruction Fin. Corp.* v. *Denver & Rio G. W. R. Co.*, 328 U. S. 495.

After the denial of certiorari, it soon developed that there was no intention of carrying out the plan of reorganization formulated by the Commission.

On April 30, 1947, a joint petition by Hon. Berryman Henwood, Trustee of St. Louis Southwestern Railway Lines, and by St. Louis Southwestern Railway Company, hereinafter referred to as the Debtor, was filed in the United States District Court, Eastern Division, Eastern Judicial District of Missouri, the reorganization Court, asking that the Court, after hearings, enter an order finding, among other things, (a) that the Debtor had sufficient cash to enable it to carry out a certain Program for the payment of maturities and accrued interest, and at the same time leaving the Debtor in a position "to meet all probable requirements for working capital and the efficient maintenance and operation of its properties"; (b) that the Debtor was not in need of reorganization; (c) that upon the carrying out of the proposed Program, all defaults would be remedied; and (d) authorizing Debtor to file a petition with the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act for the approval of the extension and repledge of such securities as were necessary to carry out the Program.

Annexed to the petition is an exhibit entitled "Program for Dismissal of Bankruptcy Reorganization Proceedings," under which it is proposed to use some $18,000,000 of the funds of the Debtor at once and substantial funds in the near future in payment of its obligations.*

---

* As early as December 1946 there had been filed in the District Court a petition by one Rosenberger asking for the payment of some $15,000,000 of Debtor's maturities and accrued interest and for a remand to the Commission. Shortly after the denial by this Court of certiorari, by motion returnable March 21, 1947, Debtor sought a further postponement of the hearings on the Rosenberger petition, stating:

> "It now appears that negotiations are pending which may result in the complete adjustment of the Rosenberger matter, in which event it will not be necessary to have a hearing upon said petition."

Rosenberger apparently regarded the joint petition of the Trustee and the Debtor as superseding his petition. Hearings on his petition are now set for June 30, 1947.

A copy of said petition and exhibit is annexed hereto as Appendix A (pp. 19-36).

The principal obligations of the Debtor now outstanding are:

$20,000,000 First Mortgage 4% Certificates;
$3,042,500 Second Mortgage 4% Certificates;
$8,063,000 First Terminal & Unifying 5's;
$9,327,500 General & Refunding 5's;
$2,241,663 Stephenville North & South Texas 5's;
$932,232 Central Arkansas & Eastern 5's;
$3,500,000 Chase National Bank loan;
$1,000,000 Mississippi Valley Trust Company loan;
$17,882,250 Southern Pacific Company loan;
$500,000 Gray's Point Terminal 5's.

The Trustee and the Debtor aver in their petition to dismiss that there has been an improvement in Debtor's financial position "during a 5-year period of $28,920,458, a figure which approximates 38% of the total capitalization provided for in the Reorganization Plan" of the Commission (par. 5), and that there is "in the possession of the Trustee, sufficient cash, or assets which are the equivalent of cash, with which to carry out the Program and, in addition, sufficient cash to meet all its necessary requirements for working capital and otherwise" (par 7).

Under the Program, after the dismissal of the reorganization proceedings, and on July 1, 1947, it is proposed to pay the following:*

	Principal	*Accrued Interest*
Second Mortgage 4s	$.....	$ 121,700
Terminal & Unifying bonds	8,063,000	403,150
General & Refunding bonds	.....	2,331,875
Stephenville 5s	2,241,663	1,394,831
Central Arkansas & Eastern 5s	932,232	591,484
Chase National Bank	700,000	259,758
Mississippi Valley Trust Co.	200,000	74,442
Southern Pacific Co.	.....	1,017,390

* See Appendix A, pp. 30-34; also Appendix B, p. 37.

The principal indebtedness thus to be paid is $12,136,-895; the accrued interest $6,194,630, a total immediate payment of $18,331,525.

The Debtor's note held by the Southern Pacific is to be extended, and the interest thereon reduced to 3%. The notes held by the Chase National Bank and the Mississippi Valley Trust Company are also to be extended, the interest on said notes being reduced to 2½%.

Payment is to be made during the next five years of an additional $5,500,000. This will include the balance of the notes due the Chase National Bank and the Mississippi Valley Trust Company in the amounts of $2,800,000 and $800,000 respectively. It will also include an annual payment to Southern Pacific of $280,000, first on account of the principal of a non-interest bearing note of $1,000,000, representing the balance of accrued interest due that company as of July 1, 1947; and when that is paid then on account of the indebtedness due Southern Pacific Company on a renewed and extended note for the present note of Debtor in the amount of $17,882,250. In addition, the Gray's Point Terminal Railway Company Bonds outstanding in the amount of $500,000 are to be paid at their maturity on December 1, 1947.

After all of these payments are made, beginning on January 1, 1953, Southern Pacific is to receive $1,000,000 per annum in reduction of the balance of the principal of its note until the entire amount has been paid.

No dividends are to be declared on the preferred or common stock of the Debtor until payment has been made of one-half of the remaining indebtedness of $2,800,000 due the Chase National Bank and $800,000 due the Mississippi Valley Trust Company.

As alleged in said petition (par. 10), and as appears from Exhibits 1 to 8 in the hearings thereon, Southern Pacific Company, the Chase National Bank and the Missis-

sippi Valley Trust Company have consented in writing to the Program and agreed to the adjustment of their respective claims, and representatives of certain owners and holders of bonds of the Stephenville North & South Texas and Central Arkansas & Eastern, subsidiaries of Debtor, have entered into agreements compromising their respective claims for something less than the full amount.

At the hearings, held on May 19th and 20th, the Chief Executive Officer, the Comptroller and the Traffic Manager of Debtor testified in support of the petition to dismiss.

Exhibit 11 (Appendix B, p. 37), placed in the record at said hearings, shows that after the expenditure of $18,331,525 on July 1, 1947, there will remain liquid resources in the amount of $8,761,879.

Exhibit 15 (Appendix C, p. 38) is an estimated income account for the years 1947-1951 after giving effect to the proposed financing as of July 1, 1947.

The greater part of the testimony and exhibits dealt with the matter of prospective earnings.

This petitioner asked at said hearings, as he had previously asked, that pending a decision by the Supreme Court upon his petition for rehearing there be no decision by the District Court on the joint petition to dismiss, or, at least, that the proceedings be remanded to the Commission in order that the matters which the Trustee and the Debtor sought to have determined by the District Court, including a determination that the Debtor was no longer in need of reorganization, should be determined by the Commission.

Thereafter the District Court granted the relief sought by said petition, making the following findings:

> "1. That the Debtor has, in the possession of the Trustee, sufficient cash, or assets which are the equiv-

alent of cash, to enable it to carry out the Program and, in addition, to meet all proper requirements for working capital and the efficient maintenance and operation of its properties;

"2. That the Debtor and its subsidiary debtors are no longer in need of reorganization and that, upon the carrying out of the Program, the Debtor will be able to meet its debts and the debts of its subsidiary debtors as they mature;

"3. That, upon the carrying out of the Program, all defaults in the payment of principal and interest on any obligations of the Debtor and its subsidiary debtors and all other defaults or events of default under any of the mortgages, indentures, or securities issued by the Debtor and its subsidiary debtors have been, or will have been, cured or remedied."

The Court also found that upon the Commission's approval of the applications under Section 20a of the Interstate Commerce Act, the proceedings should be dismissed.

A copy of the order of the District Court is annexed hereto as Appendix D (pp. 39-42).

This Court held in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 540, that the basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn, and in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 472, that valuation is a function limited to the Commission.

It is this petitioner's contention, based on said decisions, that whether the Debtor is in need of reorganization is a matter for the Commission and not the District Court to determine, and that the action of the District Court in granting the petition to dismiss, without first referring the matter back to the Commission in order to determine the prospective earnings of Debtor, was in disregard of

said decisions. The importance of this question of law calls for a reconsideration of the order denying certiorari and the granting of certiorari.

In addition, the facts set forth in the petition to dismiss and the proof in the hearings thereon serve to further distinguish this case from *Reconstruction Fin. Corp.* v. *Denver & Rio G. W. R. Co., supra,* and call for a reconsideration of the order denying certiorari on the ground of the changed conditions, and the granting of certiorari.

II

The proposed immediate reduction in indebtedness and the great decrease in interest charges render a lease by Southern Pacific of the Debtor practicable, and give additional support to the argument that on the ground of changed conditions this Court should grant a rehearing of its order denying certiorari.

It is for the Interstate Commerce Commission to determine whether a plan of reorganization coupled with a lease should be formulated. The findings and order of the District Court limit the function of the Commission merely to a determination of whether upon an application under Section 20a of the Interstate Commerce Act, the Commission should approve "of the extension, renewal, issuance, pledge and repledge by the Debtor of such securities as are necessary to carry out the Program" (Appendix D, p. 41).

Savings in operation through a lease, as the record shows, will result in increased earnings to Debtor of a million dollars per annum and in additional earnings through increased traffic.

In its majority report herein the Commission stated (R. 3562):

> "As to the possibilities of a lease of the debtor by the Southern Pacific, * * * it appears that such an

arrangement, or a consolidation of the properties, holds promise of large savings in operating expenses, with the further promise of some increase in traffic."

Chairman Eastman in his dissenting opinion showed that he was in accord with the majority members of the Commission as to the savings in operation and increased traffic resulting from a lease. He discussed the impressive proof as to savings as well as to increased revenue to be effected through a lease, as follows:

"This brings me to another very important matter. The uncontradicted evidence is that if the Southern Pacific were to lease the debtor or if the two were to be consolidated, there would be very important savings in expense as well as increases in revenue. In April 1938, Holden[1] testified in Ex Parte No. 123 that a study of economies possible in a consolidation of the Southern Pacific and the debtor indicated more than three-quarters of a million dollars. Meyer testified that in 1932 (when traffic was at its lowest ebb) Turney[2] told him that savings of $1,009,000 could be realized through consolidation.[3] He further testified that in a conference with Upthegrove in November 1932, the latter estimated the savings at about $925,000 for the year 1933, on the basis of the earnings of 9 months of the year 1932.[4] In February 1935, Paul Shoup, vice chairman of the Southern Pacific, wrote Bovenizer of Kuhn, Loeb & Company, enclosing a tentative plan for reorganization of the debtor. This plan proposed a lease of debtor to the Southern Pacific, stating that the savings 'will be not less than

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[1] Hale Holden was Chairman of Southern Pacific Company.

[2] John R. Turney was Vice-President in charge of traffic of Debtor.

[3] R. 891.

[4] R. 892.

> $500,000, and may be considerably greater.' It also stated that there should be an increase in the earnings of the consolidated property through the entrance of the Southern Pacific Company directly into such important Mississippi gateways as St. Louis and Memphis.[1] Note, in this connection, Shoup's recognition of the fact that the traffic results of the acquisition of control were not such as would follow the actual union of the properties into a single system."

Chairman Eastman expressed the opinion that savings would amount to $1,000,000 per annum.[2] *He proposed that the hearings before the Commission be reopened in order that an opportunity might be given to consider a plan of reorganization coupled with a lease* (R. 3728-3732).

On February 13, 1935, Hale Holden, Chairman of Southern Pacific Company, in a letter to the President of Debtor, had proposed a voluntary reorganization, including a lease. Said Holden:

> "* * * The good reasons for the lease, both from the point of view of economy and of a unified operation, are easily to be demonstrated and should be of weight with the Commission" (R. 1971).

Speaking for Southern Pacific in the hearings before the Commission in 1939, Holden took the position that a lease of the property of the Debtor was not practicable

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[1] R. 1974-79.

[2] In 1931 Debtor's total operating revenues were $17,950,372; in 1932, $12,554,433, in 1935, $15,742,228 and in 1939, $19,609,965 (R. 5329). In 1946 they were $46,646,703. While opportunity for savings would not necessarily increase in proportion to the increase in operating expense in carrying larger amounts of traffic, there can be no doubt that savings in operation now would be greatly in excess of a million dollars annually.

"at this time." Among reasons given were Debtor's heavy interest charges (R. 5649, 5650).*

If the good reasons for a lease were so evident in 1935, how much more evident should they be in 1947 in view of the Debtor's subsequent very large earnings and in view of the prospective immediate great decrease in interest charges?

The improvement in Debtor's financial condition was discussed in petitioner's petition to this Court (p. 15) and brief (pp. 51-58). Much proof bearing on this subject is also set forth in the petitions for certiorari of both the Debtor and Southern Pacific Company.

The progressive decrease in Debtor's interest charges if the program is adopted is evident from the following:

Fixed charges for 1946, according to the annual report of the company, were $3,015,037. The Program calls for immediate payment of maturities in the sum of $12,136,-895, which will result in a reduction in annual interest charges of $606,845. The agreement of the Southern Pacific and the Banks to extend their loans and to accept reduced interest charges will result in additional savings of $447,645, a total immediate saving of $1,054,490 per annum.

After the dismissal of the reorganization proceedings, a further decrease in interest charges is assured by the ability of Debtor to call at 105 the General and Refunding Bonds outstanding in the hands of the public in the amount of $9,327,500. Assuming that these bonds can be refunded only on a 3½% basis, there will be a further saving in interest charges in the amount of $139,913.

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* The Circuit Court of Appeals, while agreeing as to the savings and increase in earnings through a lease, relied on the testimony of Holden that a lease was not practicable (R. 5647-50). The Court overlooked Holden's earlier statement and much other proof in the record as to the desirability and practicability of a lease (R. 3163-69).

The payment, as provided in the Program, of an additional $5,500,000 (of which $1,000,000 is a non-interest bearing note) over a period of five years will result in a further saving of interest of $127,000, or a total saving of $1,321,403.

The interest charges of Debtor, instead of being $3,015,037 as of 1946, would therefore be $1,693,634.

But in determining the practicability of a lease by Southern Pacific based on a fixed rental equal to said interest charges, the fact that the interest charges will be no greater than this amount is not all that is to be considered.

Southern Pacific, if it agrees to lease Debtor at a rental in an amount equal to fixed charges, will not be obligating itself to others in that amount. Of the said charges, $536,468 is interest at 3% on the indebtedness of Debtor to Southern Pacific in the principal amount of $17,882,250. To that extent its obligation will be only to itself. *Thus, under a lease, Southern Pacific's liability to others will be limited to $1,157,166.** For every year, the year 1932 excepted, Debtor has earned in excess of this amount. Debtor for the year 1946 earned $7,680,706 available for fixed charges or not far from seven times that sum.

Can it be reasonably claimed in view of this that a lease is not practicable?

Furthermore, in thus obligating itself Southern Pacific would not be unmindful of the fact that after fixed charges are taken care of, Debtor's earnings will accrue to Southern Pacific as the owner of $19,313,400 of the Debtor's 5% preferred stock out of a total of $19,893,600

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* Even on the assumption that the interest rate on the indebtedness to Southern Pacific will be greater than 3%, the liability to others in the amount of $1,157,166 will remain unaffected.

par value, and $13,083,400 of the common stock out of a total of $17,186,100 par value. Earnings only on the $580,200 par value of preferred and $4,102,700 par value of common stock, held by minority stockholders, will not go to the Southern Pacific.

The importance of a lease to Debtor and its many thousands of security holders is evident from the fact that the saving as the result of a lease of a million dollars in operating expenses would amount to one-third of present interest charges; to one-half of the interest charges immediately after the adoption of the Program, and, at the end of five years, to an amount not far from the entire interest charges exclusive of interest on Southern Pacific's loan.

Moreover, to such increase in earnings through savings in operation must be added the earnings resulting from the increase in traffic which would accrue to Debtor as a result of "one-line" solicitation of traffic which would be initiated in connection with a lease (R. 2279-80).

Both the majority report of the Commission and Chairman Eastman's dissenting opinion, above quoted, refer to this increase in traffic.

J. T. Saunders, Vice-President in Charge of Traffic of Southern Pacific Company, testified in the hearings before the Commission (R. 2279-80):

> "I was of the opinion prior to the acquisition and control of the Cotton Belt—and that opinion has been borne out by our experience since that acquisition—that if we operated the Cotton Belt as part of the Southern Pacific System, in respect of having our own Southern Pacific trains form a direct contact and interchange between Southern Pacific and connecting lines at St. Louis, with the ability of our soliciting organization to plead with shippers that we were entitled to our 100 per cent maximum haul, everything

being equal, that we would be able to further increase the traffic moving via the Cotton Belt than we have already been able to do."

A lease, coupled with the subordination of Southern Pacific's claim, would go a long way to protect the minority stockholders. Even without subordination it would be helpful.

Not only is a lease in the interest of the Debtor and of Southern Pacific, owner of seven-eighths of Debtor's outstanding stock.

Because of the large economies effected it would be in the public interest.

The Commission ruled (R. 3562): "A possible lease cannot under the present law be forced on Southern Pacific."

In *Pepper* v. *Litton*, 308 U. S. 295, 310, it was held that simply a violation of the rules of fair play and good conscience by a claimant, a majority stockholder, in a bankruptcy proceeding justified the disallowance or subordination of his claim.

Let us assume that, in accordance with a remand by this Court, the Commission reopened the hearings. If the Commission then found that a lease was practicable and advantageous and Southern Pacific continued to refuse to lease Debtor, on this ground alone the Commission would be justified in formulating a plan of reorganization expunging or subordinating the claim of Southern Pacific Company as a creditor and stockholder of Debtor. Faced by such an alternative there can be little doubt that Southern Pacific Company would lease Debtor.

Petitioner submits that the greatly improved financial condition of Debtor requires a fresh consideration by the

Commission of the practicability of a lease and a new plan of reorganization in connection therewith.

Since the Commission's supplemental report of March, 1942, there has been paid to bondholders and creditors on account of principal and accrued interest the sum of $10,207,820.

There can be no objection to the immediate payments proposed under the Program to all parties, with the exception of Southern Pacific. Such payments would amount to $17,314,135.* These payments would be consistent with the previous practice by the Trustee of making payments on principal and accrued interest. There will therefore be no reason for delay, if this Court grants certiorari, in making payments to parties other than Southern Pacific.

If certiorari is granted, this Court would be in a position, upon the proof in the record, to remand the proceedings to the District Court, with instructions to remand to the Interstate Commerce Commission to prepare a new plan of reorganization expunging or at least subordinating Southern Pacific's claim.

This Court in its discretion could at least remand the proceedings to the District Court with instructions to remand to the Commission in order that the Commission consider the proof in the record as to the wrongful

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* A bill has been introduced at the present session of Congress, H. R. 3237, which is largely a revival of the former Reed-Wheeler bill (S. 1253, 79th Cong., 2d Sess.), vetoed by President Truman. The President pointed out in his Memorandum of Disapproval that S. 1253 failed to direct specifically "the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in Section 77 proceedings." The proposed legislation meets the President's objections. Interest charges on Debtor's indebtedness during the reorganization proceedings amount to about 60% of the principal. Debtor, if the bill is enacted, will be in a position to claim a great reduction in interest charges during reorganization.

and illegal acts of Southern Pacific in its relations with Debtor which call for subordination (including the additional proof placed in the record in the hearings before the District Court and not previously considered by the Commission, nor indeed by the courts). This Court in its discretion, in view of the fact that the Commission has never made an investigation in these proceedings, could require the Commission to institute such an investigation.

If this Court or the Commission should find that there should be subordination because of Southern Pacific's wrongful and illegal acts, it would devolve upon the Commission to prepare a new plan of reorganization with subordination of Southern Pacific's claim, whether or not a new plan would otherwise be necessary. This is in accordance with the principle, practiced by courts of equity, that having taken jurisdiction, there is a duty to do full equity, and right all wrongs suffered.

If certiorari is granted, this Court will be in a position to remand with instructions that the Commission determine whether a lease by Southern Pacific of the property of the Debtor is practicable, and, if it finds that a lease is practicable, in the event of the refusal of Southern Pacific to lease, on this ground alone and in the absence of a finding that there were other grounds for subordination, that the Commission prepare a plan subordinating Southern Pacific's claim.

The facts as to the new developments hereinabove referred to are not in the record and were not known to petitioner at the time of the filing of his original petition for certiorari. The new matter in this petition is based largely on the joint petition of the Trustee and the Debtor to dismiss the proceedings and the other documents printed in the Appendix, and the inferences to be

drawn therefrom, and is believed by this petitioner to be true.

For the reasons set forth in his petition for certiorari and in this petition for rehearing, petitioner respectfully asks that the petition for rehearing be granted, and that the judgment of this Court denying certiorari be, upon further consideration, set aside, and that the petition for certiorari be granted.

Respectfully submitted,

WALTER E. MEYER,
Petitioner, *Pro Se*,
And as Attorney for other Stockholders.

R. WALSTON CHUBB,
Attorney for Petitioner.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK } ss.:

WALTER E. MEYER, being duly sworn, deposes and says: I am the petitioner named in the foregoing petition for rehearing. As to the matter contained therein which is new and which is not in the record, and which has been brought to my attention since the denial of the petition for certiorari, such matter is true to my knowledge, information or belief.

WALTER E. MEYER.

Subscribed and sworn to before me
this 27th day of May, 1947.

JEAN SCHWEDEL,
Notary Public,
New York County.
Commission expires March 30, 1949.

I do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Dated: May 27, 1947.

WALTER E. MEYER.

Appendix A.

IN THE

DISTRICT COURT OF THE UNITED STATES
EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

In the Matter of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor.	In Proceedings for the Reorganization of a Railroad. No. 8497

JOINT PETITION OF THE TRUSTEE AND THE DEBTOR FOR AN ORDER DISMISSING THESE PROCEEDINGS AND FOR OTHER RELIEF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION:

The joint petition of BERRYMAN HENWOOD, Trustee of the property of St. Louis Southwestern Railway Company, Debtor, and of St. Louis Southwestern Railway Company of Texas, subsidiary debtor, and ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor, respectfully shows:

1. On December 12, 1935, the petitioner St. Louis Southwestern Railway Company, Debtor, filed its petition herein under Section 77 of the Bankruptcy Act, as amended, alleging that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization; and thereupon Order No. 1 in these proceedings was entered

approving said petition as properly filed. On the same date or shortly thereafter, similar petitions under Section 77 of the Bankruptcy Act, as amended, were filed herein by three wholly-owned subsidiaries of the Debtor, namely, St. Louis Southwestern Railway Company of Texas, Central Arkansas and Eastern Railroad Company, and Stephenville North & South Texas Railway Company (herein sometimes referred to as subsidiary debtors), each alleging that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of the Debtor; and thereupon this Court entered orders approving said petitions as properly filed. Thereafter, on December 31, 1935, after a hearing on certain objections to said petitions, this Court made and entered a further order approving all said petitions as properly filed and directing that its said prior orders remain in full force and effect until the further order of this Court.

2. On January 3, 1936, by order of this Court, the petitioner Berryman Henwood was appointed Trustee of all the properties of the Debtor and its subsidiary debtors, such appointment to become effective upon the approval of the bond of said Trustee and the ratification of his appointment by the Interstate Commerce Commission (herein called the "Commission"). Thereafter the Commission ratified the appointment of said Berryman Henwood and he thereupon duly qualified, and ever since has acted, and is now acting, as such Trustee.

3. Under date of June 30, 1941, the Commission issued its Report and Order setting forth a proposed Plan of Reorganization for the Debtor and its subsidiary debtors. Thereafter, under date of March 9, 1942, the Commission

issued its Supplemental Report and Order modifying said Plan of Reorganization in certain respects. On March 23, 1942, the said Plan of Reorganization, as so modified, was certified by the Commission to this Court, and thereafter, on February 8, 1944, this Court entered an order approving the said Plan of Reorganization. Thereafter, in August, 1946, upon appeals from said order, the Circuit Court of Appeals for the Eighth Circuit affirmed said order approving said Plan of Reorganization except in one relatively minor respect (the said Plan of Reorganization as modified by said decision being hereinafter usually referred to as the "Reorganization Plan"), and subsequently, on March 10, 1947, the Supreme Court of the United States denied petitions for writs of certiorari to review the decision of said Circuit Court of Appeals. Thereafter, but without staying its mandate (which was later sent to the said Circuit Court of Appeals, which later sent its mandate to this Court), said Supreme Court extended to May 23, 1947, the time within which one of the petitioners for a writ of certiorari might apply to the said Supreme Court for a rehearing of the order denying said writ.

4. The Reorganization Plan has not yet been submitted to the creditors for their acceptance or rejection. Any such submission would require at least several months. After such submission it is not unlikely that there would have to be a further hearing before this Court on confirmation of the Reorganization Plan; and thereafter any order of this Court confirming, or refusing to confirm, the Reorganization Plan would be subject to review upon appeal. Moreover, as the result of debt retirements and large payments made by the Debtor subsequent to January 1, 1942, the effective date of the Reorganization Plan, on account of overdue interest on the Debtor's outstand-

ing Bonds, it is unlikely that the Reorganization Plan could be interpreted and applied without protracted litigation. It is thus probable that neither the Reorganization Plan nor any other plan of reorganization of the Debtor can be consummated under Section 77 of the Bankruptcy Act, as amended, for at least several years.

5. Since the Debtor filed its petition for reorganization and since the Commission issued its Supplemental Report and Order of March 9, 1942, the Debtor's earnings have been very substantial. As the result of such earnings, the Debtor's financial position has greatly improved. Thus, during the 5-year period from December 31, 1941, to December 31, 1946, Debtor's outstanding indebtedness was reduced by $1,845,041; its interest in default was reduced by $8,851,523; its net investment in road and equipment increased by $2,976,312 (notwithstanding large write-offs aggregating $5,688,196, because of abandoned lines and for amortization of war facilities); its net current assets increased by $15,247,582; and its cash and temporary cash investments increased by $18,274,508. These changes reflect an aggregate improvement in Debtor's financial position during a 5-year period of $28,920,458, a figure which approximates 38% of the total capitalization provided for in the Reorganization Plan.

6. As the result of the Debtor's large accumulation of cash and its increased earnings and earning power, it is now able, upon the carrying out of the Program hereinafter mentioned, to meet its debts, and the debts of its subsidiary debtors (for all of which the Debtor is liable), as they mature. The Debtor and its said subsidiary debtors are, accordingly, no longer in need of reorganization and are no longer desirous of effecting a plan of reorganization. They desire that the respective properties of the

Debtor and of St. Louis Southwestern Railway Company of Texas, subsidiary debtor, be restored to them, and that these proceedings be dismissed. Upon the dismissal of these proceedings as herein prayed, the Debtor will pay in full all obligations of itself and its subsidiary debtors, both principal and interest, now in default, or will otherwise discharge or provide for all such obligations in a manner consented to by the holders thereof pursuant to the "Program for Dismissal of Bankruptcy Reorganization Proceedings," dated April 7, 1947 (herein sometimes called the "Program"), annexed hereto and made a part hereof as Exhibit A.

7. The Debtor has, in the possession of the Trustee, sufficient cash, or assets which are the equivalent of cash, with which to carry out the Program and, in addition, sufficient cash to meet all its necessary requirements for working capital and otherwise.

8. Upon the carrying out of the Program, all obligations of the Debtor's subsidiary debtors, Central Arkansas and Eastern Railroad Company and Stephenville North & South Texas Railway Company, which companies now have no assets or properties and no longer are engaged in any business, will have been fully paid or discharged; and all obligations of the Debtor and its subsidiary debtor, St. Louis Southwestern Railway Company of Texas, which will have then matured will have been paid, settled, or otherwise disposed of; all defaults on obligations of the Debtor and its subsidiary debtors and all defaults or events of default under any mortgages and indentures securing obligations of the Debtor and its subsidiary debtors will have been cured; and the Debtor and its subsidiary debtor, St. Louis Southwestern Railway Company of Texas, will have earnings and prospective earnings ade-

quate to meet all their obligations as they mature and, in addition, will have adequate working capital for the maintenance and efficient operation of their railway properties.

9. The Debtor by this petition, and subject to all necessary orders of the Court and the Commission, evidences its undertaking, duly authorized by its Board of Directors, to make all payments, enter into all agreements, and take all other steps to be performed by it as set forth in the Program.

10. Southern Pacific Company, The Chase National Bank of the City of New York, and The Mississippi Valley Trust Company, holders of secured notes of the Debtor, have heretofore consented in writing to the Program and agreed to the adjustment of their respective claims in the manner therein set forth. Representatives of certain owners and holders of Central Arkansas and Eastern Railroad Company First Mortgage Bonds and Stephenville North & South Texas Railway Company First Mortgage Bonds, or certificates of deposit therefor, have entered into agreements compromising their respective claims against the Debtor and its subsidiary debtors, Central Arkansas and Eastern Railroad Company and Stephenville North & South Texas Railway Company, in amounts less than the full amounts of such claims.

WHEREFORE, Petitioners pray that the Court—

1. Enter an order setting this petition down for hearing at an early date, directing that the Petitioner Trustee forthwith give notice of the time and place of said hearing to the Interstate Commerce Commission, to the subsidiary debtors, and to all intervenors and parties in interest or their counsel, and directing that said Trustee give further notice to all stockholders and creditors of the

several debtors by publishing notice of the time and place of said hearing in at least one daily newspaper in each of the cities of St. Louis, Dallas, and New York; and further directing that any person or party opposing this petition file an affidavit or answer thereto and serve copies of the same on counsel for the Petitioners not less than five days prior to the date fixed for said hearing.

2. Enter a further order, after hearing—

(a) finding and determining that the Debtor has, in the possession of its Trustee, sufficient cash, or assets which are the equivalent of cash, to enable it to carry out the Program and, in addition, to meet all probable requirements for working capital and the efficient maintenance and operation of its properties;

(b) finding and determining that the Debtor and its subsidiary debtors are not in need of reorganization and that, upon the carrying out of the Program, the Debtor will be able to meet its debts and the debts of its subsidiary debtors as they mature;

(c) finding and determining that, upon the carrying out of the Program, all defaults in the payment of principal and interest on any obligations of the Debtor and its subsidiary debtors and all other defaults or events of default under any of the mortgages, indentures, or securities issued by the Debtor and its subsidiary debtors have been, or will have been, cured or remedied;

(d) authorizing and directing the Debtor to file a petition with the Commission under Section 20a of the Interstate Commerce Act for approval of the extension, renewal, issuance, pledge and repledge by the Debtor of such securities as are necessary to carry out the Program;

(e) finding and determining that, upon the Commission approving the extension, renewal, issuance, pledge and repledge by the Debtor of the securities necessary to carry out the Program, in so far as such approval may be requisite, these proceedings should be dismissed, that the respective properties of the debtors held by the Trustee should be returned to them, and that the Debtor should make all payments and take all steps set forth in the Program and assume all obligations of the Trustee and all prior obligations of the Debtor which have not been disaffirmed by the Trustee;

(f) directing the Trustee to prepare and file a final report and accounting of his administration of the trust estate;

(g) retaining jurisdiction of this Court, after the Commission has approved the extension, renewal, issuance, pledge and repledge by the Debtor of the securities necessary to effectuate the program—

(i) to enter an appropriate order or orders authorizing and directing the Debtor and other parties to consummate the Program and fixing the date for the filing of petitions for allowances;

(ii) to dismiss the proceedings and to direct the return to the debtors of their respective properties held by the Trustee;

(iii) to determine all allowances of fees and expenses;

(iv) to approve the administration of the trust estate, to pass upon the final report and account of the Trustee and to order his discharge and the discharge of his surety; and

(h) granting such other and further relief to which the Debtor and its subsidiary debtors and the Trustee and other parties hereto may be entitled.

April 29, 1947.

(Signed) BERRYMAN HENWOOD,
Trustee of the properties of St. Louis Southwestern Railway Company, Debtor, and St. Louis Southwestern Railway Company of Texas, subsidiary Debtor.

A. H. KISKADDON,
JOHN W. MURPHY,
Cotton Belt Building,
St. Louis, Missouri,
Attorneys for Berryman Henwood, Trustee.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,

By (Signed) F. W. GREEN,
Vice President.

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New York 5, New York,
Special Attorneys for the Debtor.

(Verifications)

Appendix A.

EXHIBIT A

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

Program for Dismissal of Bankruptcy Reorganization Proceedings

I.

Introductory

On December 12, 1935, the St. Louis Southwestern Railway Company filed a petition in the United States District Court for the Eastern District of Missouri, alleging that it was unable to meet its debts as they matured and that it desired to effect a Plan of Reorganization pursuant to Section 77 of the Bankruptcy Act, as amended. On the same date or shortly thereafter similar petitions were filed by three of the Company's subsidiaries. For a period of over 11 years the properties of the Railway Company and its said subsidiaries have been operated under direction of the Court. No Plan of Reorganization has yet been consummated. Although a Plan has been certified by the Interstate Commerce Commission and approved by the Court, it has not yet been submitted to the security holders for vote thereon and it is improbable that the pending Plan of Reorganization can be consummated within the next two or three years.[1] As the result of large interest payments made pursuant to order of the District Court

[1] In March, 1942, the Commission certified the Plan to the District Court, which Plan was approved by the District Court in February, 1944. In August, 1946, the Circuit Court of Appeals for the Eighth Circuit affirmed the order of the District Court approving the Plan, except in a relatively minor respect. On March 10, 1947, the Supreme Court denied petitions for certiorari to review the decision of the Circuit Court of Appeals.

since January 1, 1942, the effective date of the Plan, the carrying out of the Plan would give rise to difficult problems of adjustment and interpretation which might result in protracted litigation. Moreover, if certain proposed legislation were enacted, the Plan might have to be entirely abandoned and a new start made on reorganization if the properties were to remain in the jurisdiction of the Court.

During the 11-year period that the railroad has been operated under jurisdiction of the Court, World War II was begun and has ended, and the financial and physical condition of the Railway Company has so changed that it no longer is in need of reorganization and desires the dismissal of the bankruptcy reorganization proceedings. Its earnings in recent years and its prospective earnings are such that, upon the carrying out of the Program outlined below, it will have discharged all obligations which will be then due and payable, will be in a position to meet all its obligations as they mature, and will have adequate working capital for the efficient maintenance and operation of its railway properties.

II.

Petition for Dismissal of Bankruptcy Reorganization Proceedings.

It is contemplated that the Railway Company and/or the Bankruptcy Trustee, and possibly its said subsidiaries, will file a petition with the District Court for a dismissal of the Bankruptcy reorganization proceedings on the ground that the Railway Company and its subsidiary debtors are no longer in need of reorganization and will be able to meet their obligations as they mature after the dismissal of such proceedings and after making the adjustments provided for in this Program. It is also con-

templated that, with the approval of the Court, application will be made to the Interstate Commerce Commission for approval of the renewal and extension of certain outstanding notes of the Railway Company, the issuance of certain non-interest-bearing Serial Notes, the repledge of bonds as collateral therefor, and any other steps in connection therewith if such approval is required.

III.

Program of Railway Company in connection with Termination of Bankruptcy Reorganization Proceedings.

Upon the dismissal of the bankruptcy proceedings, and subject to the order of the Court, the Railway Company will either pay in full all obligations of principal and interest now in default or will otherwise provide for all of such obligations in a manner consented to by all the holders thereof. Securities in default which are not paid or otherwise provided for will be continued on a current interest basis. The following action will be taken in respect to the various securities and obligations in default:[2]

1. *$10,000,000 Second Mortgage Income Certificates.* All unpaid interest coupons, maturing prior to the closing date, on these Certificates will be paid, and future accruing interest will be paid when and as the same becomes payable pursuant to the provisions of the Second Mortgage.

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[2] The closing date has been assumed to be July 1, 1947, for the purpose of the computations herein. Actually such closing date may be later, and in that event adjustments will have to be made. All amounts and computations herein are subject to verification and correction.

Appendix A.

2. *$21,596,000 First Terminal and Unifying Bonds—Payments and Cancellation.* All the First Terminal and Unifying Bonds (herein referred to as Terminal Bonds) are to be cancelled, the Terminal Mortgage is to be satisfied, and the collateral held by the Terminal Mortgage Trustee turned over to the Chemical Bank & Trust Company, as Trustee for the General and Refunding Bonds (herein referred to as Refunding Bonds), thus stepping up the position of the lien for the Refunding Bonds to the place now held by the Terminal Mortgage. This collapsing of the Terminal Mortgage will be effectuated as follows:

   (a) $8,063,000 Terminal Bonds held by the public (the principal being now due and payable by declaration) will be paid, with accrued interest to the date of payment, the funds therefor to be deposited by the Railway Company in trust with the Guaranty Trust Company of New York, the Terminal Mortgage Trustee.

   (b) $13,533,000 pledged Terminal Bonds will be cancelled and surrendered by the Chemical Bank & Trust Company, as Refunding Mortgage Trustee, to the Terminal Mortgage Trustee.

   (c) The Terminal Mortgage Trustee will cancel the Terminal Mortgage and deliver all collateral held by it to the Chemical Bank & Trust Company, as Refunding Mortgage Trustee.

3. *$39,557,500 General and Refunding Bonds.* All unpaid interest coupons, maturing prior to the closing date, on the $9,327,500 principal amount of these Bonds held by the public will be paid, and all subsequently accruing interest will be paid when and

as the same becomes due. The $13,533,000 Terminal Bonds pledged under the Refunding Mortgage will be surrendered to the Terminal Mortgage Trustee for cancellation, the Terminal Mortgage will be cancelled and all collateral held under that Mortgage delivered to the Chemical Bank & Trust Company, as Trustee under the Refunding Mortgage, as provided in paragraph 2 above. $30,230,000 principal amount of the Refunding Bonds are pledged to secure the 5% Secured Notes held by Southern Pacific Company, The Chase National Bank of the City of New York, and The Mississippi Valley Trust Company, mentioned below. These pledgees will waive the payment of the unpaid interest on the pledged Refunding Bonds accrued to the date of closing and the pledged Bonds will be appropriately stamped to evidence such waiver. They will also waive the payment of all unpaid accrued interest on the pledged Southern Illinois and Missouri Bridge Company Bonds.

4. *$2,241,663 Stephenville North & South Texas Railway Company First Mortgage Bonds.* These Bonds will be paid at the reduced principal amount thereof, with interest to the date of payment, under arrangements similar to those provided for the payment of the publicly-held Terminal Bonds as set forth in paragraph 2(a) above, except to the extent that certain holders thereof may have agreed to accept less than such payment of principal and interest in full.

5. *$932,232 Central Arkansas & Eastern Railroad Company First Mortgage Bonds.* These Bonds will be paid at the reduced principal amount thereof, with interest to the date of payment, under arrangements

similar to those provided for the payment of the publicly-held Terminal Bonds as set forth in paragraph 2(a) above, except to the extent that certain holders thereof may have agreed to accept less than such payment of principal and interest in full.

6. *$3,500,000 Chase National Bank 5% Secured Note.* $259,758 on account of interest accrued to July 1, 1947, and $700,000 on account of the principal of this Note will be paid. The Note will be renewed and extended in the reduced principal amount of $2,800,000 and will continue to be secured by the Refunding Bonds and the Southern Illinois and Missouri Bridge Company Bonds now pledged with the noteholder. A Renewal and Extension Agreement will be entered into with The Chase National Bank of the City of New York, setting forth the terms and conditions of the renewal and extension of the Note. Such Agreement will provide that the Note until due will bear interest at the rate of 2½% per annum, payable semi-annually, and that the reduced principal amount will be paid in full by semi-annual payments thereon in equal amounts over a five-year period. This Note, as renewed and extended, will be redeemable without the payment of any premium, as a whole at any time, or in part from time to time in an amount equal to any one or more of the principal instalments of such Note. No dividends will be payable on the preferred and common stocks of the Railway Company until 50% of the reduced principal amount of the Note has been paid. At the option of the said Bank the Railway Company will, in lieu of entering into a Renewal and Extension Agreement as aforesaid, issue one or more renewal notes to the Bank on the foregoing terms.

7. *$1,000,000 Mississippi Valley Trust Company 5% Secured Note.* $74,442 on account of interest accrued to July 1, 1947, and $200,000 on account of the principal of this Note will be paid. The Note will be renewed and extended in the reduced principal amount of $800,000 and will continue to be secured by the Refunding Bonds and Southern Illinois and Missouri Bridge Company Bonds now pledged with the noteholder. A Renewal and Extension Agreement will be entered into with The Mississippi Valley Trust Company, setting forth the terms and conditions of the renewal and extension of the Note. Such Agreement will provide that the Note until due will bear interest at the rate of 2½% per annum, payable semi-annually, and that the reduced principal amount will be paid in full by semi-annual payments thereon in equal amounts over a five-year period. This Note, as renewed and extended, will be redeemable without the payment of any premium, as a whole at any time, or in part from time to time in an amount equal to any one or more of the principal instalments of such Note. No dividends will be payable on the preferred and common stocks of the Railway Company until 50% of the reduced principal amount of the Note has been paid. At the option of the said Bank the Railway Company will, in lieu of entering into a Renewal and Extension Agreement as aforesaid, issue one or more renewal notes to the Bank on the foregoing terms.

8. *$17,882,250 Southern Pacific Company 5% Secured Note.* $1,017,390 on account of accrued interest will be paid in cash. The balance of accrued interest to July 1, 1947, $1,000,000, will be paid by the issuance by the Railway Company of non-interest-bearing Serial Notes for $1,000,000. The Note in the amount

of $17,882,250 presently held by Southern Pacific Company will be renewed and extended in the same principal amount. This Note and the non-interest-bearing Serial Notes will be secured by the Refunding Bonds and Southern Illinois & Missouri Bridge Company Bonds now pledged with Southern Pacific Company. A Renewal and Extension Agreement will be entered into with Southern Pacific Company, setting forth the terms and conditions of the renewal and extension of the $17,882,250 Note. Such Agreement will provide that the Note until due will bear interest at the rate of 3% per annum, payable semi-annually, and that the principal amount will be paid in full by semi-annual payments thereon as hereinafter indicated. This Note, as renewed and extended, will be redeemable without the payment of any premium, as a whole at any time, or in part from time to time in an amount equal to any one or more of the principal instalments of such Note. During the first five years after the closing, $720,000 a year will be required to make the payments of principal on the renewed and extended Notes to be held by the two above-mentioned banks. The difference between said sum and $1,000,000, or $280,000, will be payable in equal semi-annual instalments to Southern Pacific Company, first on account of the principal of the aforesaid non-interest-bearing Serial Notes and then on account of the principal on the renewed and extended Note for $17,882,250 to be held by that Company. The principal amount of the renewed and extended Note for $17,882,250 will be payable to the extent of $120,000 on July 1, 1951, then in equal semi-annual instalments of $140,000 during the year ending July 1, 1952, and thereafter in semi-annual instalments of $500,000 each.

Appendix A.

$500,000 Gray's Point Terminal Railway Company First Mortgage Bonds. The principal amount and accrued interest of these bonds, which are not in default, will be paid by St. Louis Southwestern Railway Company at their maturity on December 1, 1947.

IV.

Undertakings of Railway Company.

The Railway Company, in connection with the dismissal proceedings, will undertake, subject to requisite approval of the District Court and the Interstate Commerce Commission, (a) to make all payments, enter into all undertakings, and take all other steps set forth in the Program, (b) to pay all proper costs and expenses incurred by officers of the Court in the reorganization proceedings and all administrative claims or expenses approved by the Court, (c) to pay all allowances and expenses (including reasonable attorneys' fees) of all committees or other representatives of creditors and stockholders, trustees under indentures, depositaries and other persons, incurred in connection with the proceedings and the Plan of Reorganization as may be approved by the Court within such maximum limitations as may be fixed by the Interstate Commerce Commission, (d) to pay all legal fees and expenses in connection with the dismissal of the bankruptcy reorganization proceedings to the extent required by indentures or other contracts or as may be approved by the Railway Company, and (e) to assume all contracts, commitments and obligations entered into or incurred by the Trustee in the operation of the properties of the Railway Company and all prior contracts, commitments, and obligations of the Railway Company which have not been disaffirmed by the Trustee.

Dated April 7, 1947.

Appendix B.

Exhibit 11 in the Hearings Held Before the District Court on May 19 and 20, 1947, on the Joint Petition of the Trustee and the Debtor to Dismiss the Reorganization Proceedings, Etc.

St. Louis Southwestern Railway Company

Cash on hand, January 1, 1947, plus proceeds of operation to June 30		$27 093 404
Payments contemplated for July 1, 1947:		
Obligation	*Principal*	
StLSW Second Mortgage	$ —	
StLSW Terminal Mortgage	8 063 000	
StLSW General Mortgage	—	
CA&E First Mortgage	932 232	
SN&ST First Mortgage	2 241 663	
Bank Notes	900 000	
R.F.C. Note—Southern Pacific	—	
Total Principal	$12 136 895	
	Interest	
StLSW Second Mortgage	$ 121 700	
StLSW Terminal Mortgage	403 150	
StLSW General Mortgage	2 331 875	
CA&E First Mortgage	591 484	
SN&ST First Mortgage	1 394 831	
Bank Notes	334 200	
R.F.C. Note—Southern Pacific	1 017 390	
Total Interest	$ 6 194 630	18 331 525
Remaining liquid resources July 2, 1947		$ 8 761 879
Proceeds of operation, July 1, 1947 to December 31, 1947, after paying principal of Gray's Point Terminal Bonds and interest on undisturbed debt, new notes, and extended notes	5 526 746	
Expenditures, July 1, 1947 to December 31, 1947, for principal and interest	1 107 276	
Net addition to cash last six months 1947		4 419 470
Liquid resources, December 31, 1947		$13 181 349

Appendix C.

EXHIBIT 15 IN THE HEARINGS HELD BEFORE THE DISTRICT COURT ON MAY 19 AND 20, 1947, ON THE JOINT PETITION OF THE TRUSTEE AND THE DEBTOR TO DISMISS THE REORGANIZATION PROCEEDINGS, ETC.

ST. LOUIS SOUTHWESTERN RAILWAY LINES

Estimated Income Account Years 1947-1951 giving effect to Proposed Financing as of July 1, 1947

	1947	1948	1949	1950	1951
1 Total Operating Revenues..	$53 083 000	$49 980 000	$47 560 000	$45 252 000	$42 982 000
2 Total Operating Expenses..	32 442 000	31 097 000	30 313 000	29 601 000	28 675 000
3 Net Revenue from Railway Operations	20 641 000	18 883 000	17 247 000	15 651 000	14 307 000
4 Taxes—Federal Income	5 233 000	4 798 000	4 203 000	3 640 000	3 174 000
5 All Others. Incl. Payroll	2 785 000	2 716 000	2 700 000	2 637 000	2 573 000
6 Hire of Equipment & Joint Facility Rents	1 832 000	1 668 000	1 614 000	1 562 000	1 509 000
7 Net Railway Operating Income	10 791 000	9 701 000	8 730 000	7 812 000	7 051 000
8 Non-Operating Income	248 000	127 000	127 000	127 000	127 000
9 Income Available for Fixed Charges	11 039 000	9 828 000	8 857 000	7 939 000	7 178 000
10 Fixed Charges	2 500 000	2 000 000	2 000 000	2 000 000	2 000 000
11 Net Income	8 539 000	7 828 000	6 857 000	5 939 000	5 178 000
12 Road and Equipment—Cash.	3 486 000	573 000	873 000	2 463 000	2 448 000
13 Serial Note Maturities	500 000	1 000 000	1 000 000	1 000 000	1 000 000

5-12-47.

Appendix D.

IN THE

DISTRICT COURT OF THE UNITED STATES
EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

In the Matter of

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad.

No. 8497.

ORDER

LOOKING TO FINAL DISMISSAL OF THESE PROCEEDINGS, AUTHORIZING DEBTOR TO FILE APPLICATION WITH INTERSTATE COMMERCE COMMISSION, AND GRANTING OTHER RELIEF

* * * * *

Upon due consideration of the joint petition of BERRYMAN HENWOOD, Trustee of the property of St. Louis Southwestern Railway Company, Debtor, and of St. Louis Southwestern Railway Company of Texas, subsidiary debtor, and ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor, verified and filed herein on the 30th day of April 1947, for an order dismissing these proceedings and for other relief, and the joint petition having been set down for hearing on the 19th day of May 1947, and having come on to be heard on said date;

And it appearing to the Court that the Trustee, pursuant to order of this Court, dated April 30, 1947, gave reasonable notice of the time and place of said hearing by mailing a copy of such order by registered mail to the Interstate

Commerce Commission, to each subsidiary debtor, to each of the mortgage trustees of the several debtors or their attorneys, to all intervenors herein or their attorneys, and to all other parties to whom the said Trustee customarily sends printed copies of orders entered in these proceedings, all as provided in such order:

And it further appearing to the Court that the Trustee, pursuant to said order of the Court, dated April 30, 1947, duly caused to be published the notice of the time and place of said hearing for three days, each of which was at least ten days prior to the date of said hearing, in the "St. Louis Post-Dispatch", "Dallas News", and "New York Times";

And the Trustee, the Debtor and other parties having appeared by their respective counsel at said hearing on said joint petition and the Court having heard such counsel and the testimony of witnesses thereat and having considered the "Program for Dismissal of Bankruptcy Reorganization Proceedings", dated April 7, 1947 (herein referred to as the Program), annexed to the joint petition and having considered the evidence presented at said hearing and having considered all objections to said joint petition filed herein or made at said hearing;

The Court makes the following

FINDINGS:

1. That the Debtor has, in the possession of the Trustee, sufficient cash, or assets which are the equivalent of cash, to enable it to carry out the Program and, in addition, to meet all proper requirements for working capital and the efficient maintenance and operation of its properties;

2. That the Debtor and its subsidiary debtors are no longer in need of reorganization and that, upon the carry-

ing out of the Program, the Debtor will be able to meet its debts and the debts of its subsidiary debtors as they mature;

3. That, upon the carrying out of the Program, all defaults in the payment of principal and interest on any obligations of the Debtor and its subsidiary debtors and all other defaults or events of default under any of the mortgages, indentures, or securities issued by the Debtor and its subsidiary debtors have been, or will have been, cured or remedied;

4. That, upon the Commission's approval of the extension, renewal, issuance, pledge and repledge by the Debtor of the securities necessary to carry out the Program, in so far as such approval may be requisite, these proceedings should be dismissed, that the respective properties of the debtors held by the Trustee should be returned to them, and that the Debtor should make all payments and take all steps set forth in the Program and assume all obligations of the Trustee and all prior obligations of the Debtor which have not been disaffirmed by the Trustee.

Now, Therefore, it is

ORDERED:

1. That the Debtor is authorized and directed to file an application with the Interstate Commerce Commission under Section 20 (a) of the Interstate Commerce Act for approval of the extension, renewal, issuance, pledge and repledge by the Debtor of such securities as are necessary to carry out the Program;

2. That the jurisdiction of the Court is retained over these proceedings to enter an appropriate order or orders

authorizing and directing the Debtor and other parties to consummate the Program and fixing the date for the filing of petitions for allowances; to dismiss the proceedings and to direct the return to the debtors of their respective properties held by the Trustee; to determine all allowances of fees and expenses; to direct the Trustee to prepare and file a final report and accounting of his administration of the trust estate; to approve the administration of the trust estate, to pass upon the final report and act of the Trustee and to order his discharge and the discharge of his surety; and to grant such other and further relief to which the Debtor and its subsidiary debtors and the Trustee and other parties hereto may be entitled.

(S) GEO. H. MOORE,
District Judge

Dated May 20, 1947.

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JUN 19 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 909

WALTER E. MEYER, Intervener,

Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITIONER'S REPLY TO MEMORANDA IN OPPOSITION TO PETITION FOR REHEARING

Dated June 18, 1947.

WALTER E. MEYER,
Petitioner, *Pro Se,*
And as Attorney for other Stockholders,
31 Nassau Street,
New York 5, N. Y.

R. WALSTON CHUBB,
Attorney for Petitioner,
408 Olive Street,
St. Louis 2, Missouri.

In the

Supreme Court of the United States

October Term, 1946.

No. 909

Walter E. Meyer, Intervener,

Petitioner,

v.

Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITIONER'S REPLY TO MEMORANDA IN OPPOSITION TO PETITION FOR REHEARING

Petitioner on June 13th received a "Memorandum on behalf of St. Louis Southwestern Railway Company, Debtor, in opposition to petition for rehearing," dated May *28*, 1947. On June 16th he received a "Reply by Southern Pacific Company, one of the respondents, to petitioner's petition for rehearing," dated May *23rd*.

Petitioner's petition for rehearing was filed with this Court on May *28th*, and on the same day copies were mailed to both the Debtor and Southern Pacific Company. It is obvious from the dates of said memoranda, as well as from statements contained therein, that said memoranda are not in reply to the petition for rehearing.

As To the Debtor's Memorandum

The Debtor contends (p. 8) that if petitioner desires to raise the question of whether the District Court has jurisdiction to dismiss proceedings under Section 77 he can only do so through challenge of the District Court's order of May 20, 1947, and that such issue is not before this Court upon the petition for certiorari.

The action of the District Court in dismissing the proceedings constitutes a new development, which at the same time raises a new question of law for consideration by this Court. A new development has been held sufficient ground for reconsideration by this Court of its denial of certiorari (*Paramount P. Corp.* v. *American Tri-Ergon Corp.*, 293 U. S. 528, 294 U. S. 464; *Sanitary Refrigerator Co.* v. *Winters*, 278 U. S. 587, 280 U. S. 30).

Debtor fails to meet petitioner's contention that the order of the District Court dismissing the reorganization proceedings, without first referring the matter back to the Commission in order to determine whether the Debtor is or is not in need of reorganization, raises a question of such importance as to call for a decision by this Court thereon, and therefore for a reconsideration of the order denying certiorari.

Debtor in its memorandum (p. 10) states that its greatly improved financial condition was sufficiently shown to this Court in the petitions for certiorari of the Debtor and of the Southern Pacific Company, and that there was no occasion to discuss its ability to pay out the sum of $18,331,525 on July 1, 1947, as revealed in the joint petition to dismiss.

In referring to the large balance of assets over liabilities, Debtor in its petition (p. 39) stated that these assets could either be used to reduce existing indebtedness or

"be put back into the system in the form of improvements in service, efficiency and equipment * * *." Southern Pacific in its petition (p. 30) states: "These accumulations of assets may be used in two ways: (1) to pay off the principal of existing indebtedness * * *; (2) to be plowed back into the business in the form of countless improvements in service, equipment and efficiency * * *." Thus this Court remained in ignorance of the important fact that there was no occasion to absorb a large amount of capital funds in additions and betterments, and that practically all of the liquid assets of the Debtor were available for the reduction of indebtedness.

It is petitioner's contention that if the fact that Debtor would be in a position to reduce its indebtedness by some $18,000,000 as of July 1, 1947, had been revealed to this Court by the Debtor, the Court would have been impressed with the necessity for a new plan of reorganization and would have granted certiorari.

As To Southern Pacific's Reply

Southern Pacific argues that the dismissal program will restore the stockholders to the same legal position as prior to the institution of reorganization proceedings.

Southern Pacific is both a large creditor and owner of seven-eighths of the outstanding stock of Debtor. It has shown in the past that it attaches greater importance to its interest as a creditor than to its interest as a stockholder. A restoration of the legal position of the minority stockholders will not afford protection against a repetition by Southern Pacific of its past wrongful and illegal acts in its relations with the Debtor.

Southern Pacific states that by the dismissal of the proceedings the economic position of the stockholders will be greatly improved.

The earnings of the Debtor at present are very large. If Southern Pacific carries out its fiduciary obligation to Debtor as controlling stockholder and its contractual obligations, such earnings will continue to be large.

There can be no certainty, however, that earnings will continue indefinitely at the present level.

The most effective means of protecting the interest of the minority stockholders would be the subordination of Southern Pacific's claim. Petitioner contends that the proof in the record calls for subordination.

Irrespective of this, petitioner submits that every reasonable step should be taken to add to the permanent earning power of the Debtor. A large increase in earning power can be effected through a lease of the property of the Debtor by Southern Pacific, as has been brought out in the petition for rehearing. The record shows that through a lease earnings long ago could have been so increased as to have dispensed with the necessity for reorganization proceedings.* Yet Southern Pacific refused and has continued to refuse to lease Debtor.

Beginning as far back as twenty-two years ago, and at least up to the outbreak of the war, as petitioner contends, Debtor's assets were wasted and its earnings impaired as a result of breaches by other railroads of their obligations to Debtor. During these many years almost all of the time of your petitioner has been taken in an endeavor to assert the rights and protect the interest of the Debtor.

An opportunity is afforded in connection with these proceedings to require Southern Pacific to lease the property of Debtor upon terms fair to all. A plan of reorganization coupled with a lease, as has been brought out, was proposed by Chairman Eastman of the Interstate Com-

---

* Petition for rehearing, pp. 9, *et. seq.*

merce Commission. A lease would be in the interest of Southern Pacific and of the Debtor. Because it would make for increased efficiency and economy, it would be in the public interest.

Conclusion

For the reasons set forth in his petition for certiorari and his petition for rehearing, petitioner asks that the petition for rehearing be granted, and that, upon further consideration, the petition for certiorari be granted.

Dated, June 18, 1947.

Respectfully submitted,

WALTER E. MEYER,
Petitioner *Pro Se,*
And as Attorney for other Stockholders.

R. WALSTON CHUBB,
Attorney for Petitioner.

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CLERK

No. 909.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

WALTER E. MEYER, INTERVENER, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*, *Respondents.*

MEMORANDUM ON BEHALF OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR REHEARING.

JACOB M. LASHLY,
705 Olive Street, St. Louis 1, Missouri,
Attorney for St. Louis Southwestern Railway Company, Debtor, Respondent.

May 28, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 909.

WALTER E. MEYER, Intervener,

Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

MEMORANDUM ON BEHALF OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR REHEARING.

Statement.

Petitions for certiorari in the St. Louis Southwestern Railway Company reorganization proceeding were filed by Southern Pacific Company (No. 879), by Walter E. Meyer (No. 909), and by this Respondent (No. 936). All three petitions sought review of the decision of the Circuit Court of Appeals for the Eighth Circuit on the ground, in essence, that the Plan of Reorganization had become unfair in the light of "changed conditions." In addition, the Petitioner in this case (No. 909), Walter E. Meyer, raised certain other issues, his main contention apparently being that the Circuit Court of Appeals erred in holding that there was substantial evidence to sustain the Commission's finding,

affirmed by the District Court, that the Debtor's earning power has not been impaired by breaches of fiduciary and other obligations by Southern Pacific Company which, Petitioner claimed, required the "subordination" of the claim of that Company.

All three petitions were denied on March 10, 1947. Thereafter, by successive orders, the time of the Petitioner in this case, No. 909, to file a petition for rehearing was extended to May 23, 1947. On the last-mentioned date this time was further extended to May 28, 1947.

This Respondent has not been served with, or seen, the proposed petition for rehearing. It has, however, read in the Clerk's office Petitioner's last application, dated May 21, 1947, for a further extension of time to file the same, in which application Petitioner asserts that "important developments" since the filing of his petition for certiorari require reconsideration of the denial thereof by the Court.

Incomplete and possibly misleading statements in Petitioner's said application dated May 21, 1947, concerning the "important developments," which Petitioner indicates he intends to assert as reasons for granting a rehearing, impel this Respondent to invoke the rarely sought privilege of reply,—such reply, however, to be devoted to matters occurring subsequent to the filing of the petitions for certiorari.

The admittedly "important developments" since the filing of the petitions for certiorari (*which, however, in no sense require a reconsideration of the denial of certiorari*) are as follows:

On April 10, 1947, the Circuit Court of Appeals, having been notified by this Court that the several petitions for writs of certiorari, including No. 909, had been denied, sent

its mandates to the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, affirming, with a minor exception, the order of the District Court approving the Plan.

On April 30, 1947, this Respondent (herein usually called the Debtor) and its Trustee filed a Joint Petition in the District Court alleging, in effect, that, as a result of the Debtor's large accumulation of cash and increased earnings and certain compromise and adjustment agreements entered into with some of its creditors, it is now able to pay or satisfy all its matured indebtedness and to meet its debts as they mature; that, accordingly, it is no longer in need of reorganization and desires that the reorganization proceedings be dismissed; that upon dismissal of the proceedings it will pay in full all obligations now in default, or will otherwise provide therefor in a manner consented to by the holders thereof, pursuant to a Dismissal Program annexed to said Joint Petition; and that the Debtor has sufficient liquid resources to carry out the Dismissal Program and, in addition, to meet all necessary requirements for working capital and the efficient operation and maintenance of its properties. Among other advantages accruing to the Debtor from the carrying out of the Dismissal Program (copy of which is annexed hereto as Appendix A) will be the renewal and extension of indebtedness aggregating $21,482,250 principal amount on a serial maturity basis, at reduced interest rates of 2½% and 3% instead of the present rate of 5%, under an arrangement calling for aggregate principal payments of $1,000,000 a year.

Pursuant to order of the District Court on April 30, 1947, said Joint Petition was set down for hearing on May 19, 1947, and notice thereof was given to the Interstate Commerce Commission and to all parties in interest, in-

cluding Walter E. Meyer, and published in various newspapers in New York, St. Louis, and Dallas. Said order provided that any answers or affidavits in opposition to the Joint Petition be filed not later than five days prior to the hearing date.

Thereafter the Petitioner Meyer made a motion, returnable May 16, 1947, to postpone said hearing until this Court should act upon his proposed petition for rehearing of the denial of his petition for certiorari. That motion, after argument, was denied by the District Court on May 16, 1947.

On May 19 and May 20, 1947, a hearing was held on the Joint Petition to dismiss the reorganization proceedings. Neither at nor prior to the hearing was any answer or affidavit filed in opposition to the Joint Petition. At the hearing the Petitioner Meyer filed a "Memorandum" in opposition to the Joint Petition, in which he said that the proper procedure was to remand the proceedings to the Commission so that Petitioner might ask "that the Commission reconsider its refusal to subordinate the claim of Southern Pacific Company" *(an issue which has already been ruled adversely to Mr. Meyer by the Commission and both courts below).*

At the conclusion of the hearing, on May 20, 1947, and with the vigorous approval of every party appearing at the hearing except Mr. Meyer, the District Court entered an order, a copy of which is annexed hereto as Appendix B,—

> (1) finding, among other things,
>
> (a) that the Debtor has sufficient liquid assets to enable it to make all the payments contemplated by the Dismissal Program and, in addition, to meet all requirements for working capital and the efficient maintenance and operation of its properties;

(b) that the Debtor is no longer in need of reorganization and that, upon the carrying out of the Dismissal Program, it will be able to meet its debts as they mature; and

(c) that, upon approval by the Interstate Commerce Commission of the extension, renewal, issue, pledge and repledge by the Debtor of the securities necessary to carry out the said Program, the reorganization proceedings should be dismissed;

(2) directing the Debtor to file an application with the Commission under Section 20a of the Interstate Commerce Act for approval of the extension, renewal, issue, pledge and repledge by the Debtor of the securities necessary to carry out the said Program; and

(3) retaining jurisdiction to enter appropriate orders directing the parties to consummate the Dismissal Program and to dismiss the proceedings.

On May 26, 1947, pursuant to said order of May 20, 1947, the Debtor filed with the Commission its application under Section 20a of the Interstate Commerce Act as above mentioned.

The Effect of Carrying Out the Dismissal Program.

The Plan of Reorganization certified by the Commission and approved by both courts below completely wipes out both the preferred and common stockholders of the Debtor and eliminates a substantial portion of the junior debt. The Dismissal Program, when consummated, will result in the restoration of a solvent debtor to its stockholders, with no obligations in default. Such a disposition

of the proceedings must necessarily be more satisfactory to all stockholders than *any possible plan of reorganization.*

The Dismissal Program calls for the payment in cash of indebtedness, principal and interest, amounting to $18,331,525 as of July 1, 1947. It was made possible by the Debtor's accumulation of cash and the voluntary agreements of the holders of the Debtor's 5% Secured Notes, aggregating $22,382,250 in principal amount, to renew and extend said notes in an aggregate principal amount of $21,482,250 on a sharply reduced interest basis.

The effect of carrying out the Dismissal Program will be to reduce the Debtor's funded indebtedness from $66,939,145 to $55,802,250 and to reduce its annual fixed charges from $3,133,144 to $2,050,529.

Since the effect of carrying out the Program will be to reduce the Debtor's annual fixed charges by over $1,000,000 a year, each day's unnecessary delay in carrying out the Program will cost the Debtor and its securityholders approximately $3,000. Moreover, the secured noteholders have the right to cancel their compromise and adjustment agreements upon 30 days' notice, so that any undue delay in carrying out the Program may result in its complete nullification, to the great injury of all creditors and stockholders. It was because of such considerations, and a justifiable uncertainty as to whether the Petitioner would fully and accurately set forth the "important developments" since the filing of the petitions for certiorari, that this Respondent, at the risk of unduly dignifying the petition for rehearing, has undertaken to reply thereto.

Argument.

The matters occurring since the petitions for certiorari were filed, as above set forth, do not in any way require, or even suggest, reconsideration of the petition for certiorari in No. 909. On the contrary, they demonstrate that, for all practical purposes, the principal issues raised by all the petitions have become moot.

The Issue as to the Fairness of the Plan.

In his petition for certiorari, Mr. Meyer contended, as did the Debtor (No. 936) and Southern Pacific (No. 879), that the Plan had become unfair because of "changed conditions". Whether or not that is the case is no longer important or relevant, since the District Court has found that the Debtor can now pay or otherwise provide for all its matured indebtedness, can now meet its debts as they mature and, hence, is no longer in need of reorganization; and has ordered that, when the Commission has approved the extension, renewal, issue, pledge and repledge of the securities necessary to carry out said Program, the reorganization proceedings should be dismissed.

Patently, it would be a wholly meaningless act for this Court to grant certiorari for the purpose of determining whether or not the Plan has become unfair in the light of the "changed conditions", because even if it so found, contrary to both courts below, the decision would not have any practical effect upon the rights of any party, including Petitioner. In other words, since the District Court has found (upon the basis of considerations having nothing to do with the fairness or unfairness of the Plan) that the

proceedings should be dismissed and has taken formal action looking to such dismissal, thus eliminating the necessity for *any plan,* the question whether the approved Plan is fair has, for all practical purposes, become moot.

Petitioner asserts in his said application for an extension, dated May 21, 1947, that whether the Debtor is in need of reorganization is a question for the Commission and not for the District Court, citing *Ecker* v. *Western Pacific Corp.,* 318 U. S. 448 (1943); *Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523 (1943). What bearing this assertion has on the proposed petition for rehearing is not discernible. If Petitioner desires to raise the question whether a District Court has jurisdiction to dismiss proceedings under Section 77 of the Bankruptcy Act on the ground that a reorganization is no longer necessary, he should directly challenge the District Court's order of May 20, 1947. Surely, that issue is not before this Court upon the petition for certiorari.

As a matter of fact, however, the jurisdiction of a District Court to dismiss a Section 77 proceeding when the basic purpose thereof has been achieved, or when the proceeding is no longer necessary (as a result of the debtor's having become able to meet its debts as they mature), is clearly demonstrated by numerous decisions dealing with the dismissal of (a) ordinary bankruptcy proceedings[1], (b) equity receivership proceedings[2], (c) proceedings

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[1] See, *In re Public Industrials Corporation,* 53 F. Supp. 960, 961 (D. Del., 1944); *In re Vidor,* 46 F. Supp. 468 (S. D. N. Y., 1941).

[2] See, *Railroad Co.* v. *Soutter,* 2 Wallace 510, 521-522 (1864).

under Section 77B, or Chapter X, of the Bankruptcy Act[3], and (d) proceedings under Section 77 itself.[4]

The Issues Involved in Petitioner's Charges against Southern Pacific Company.

In his petition for certiorari Mr. Meyer also contended—

(1) that the Circuit Court of Appeals did not make an independent review to determine whether there was legal objection to the record upon which the Commission had estimated the Debtor's prospective earnings and to determine whether the claim of Southern Pacific Company should be expunged or subordinated;

(2) that both the Commission and the District Court failed to make an investigation alleged to be necessary to insure the control of the Debtor in the interests of its securityholders upon emergence from reorganization;

(3) that Petitioner's motion in the Circuit Court of Appeals to remand the proceedings should be granted, and

(4) that the Circuit Court of Appeals erred in holding that it was in the discretion of the District Court to deny the Petitioner's motion for a new hearing.

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[3] See, *Sword S. S. Line* v. *Vendramis*, 116 F. (2d) 665, 668, (C. C. A. 2d, 1940); *In re William Jameson & Co., Inc.*, 47 F. Supp. 450 (S. D. N. Y., 1942); Gerdes, Corporate Reorganizations, §1153, page 1838.

[4] In two unreported cases under Section 77, the proceedings have been dismissed when it developed during the course of the proceedings that the debtors had become able to meet their debts as they matured. See, *In the Matter of Hoboken Manufacturers Railroad Co.*, No. 4873a, in the District Court of New Jersey, decided January 27, 1947; *In the Matter of Missouri Pacific Railroad Co.*, No. 6935, in the Eastern Judicial District of Missouri, dismissing from bankruptcy Missouri-Illinois Railroad Company, decided June 1, 1944.

Plainly, the matters occurring subsequent to the filing of the petitions for certiorari, as above set forth, have no bearing whatever on the foregoing issues. As a matter of fact, Petitioner's basic contention, that the claim of Southern Pacific Company should be "subordinated" because of alleged breaches of fiduciary and other obligations, was made in connection with a proposed plan of reorganization in a proceeding under Section 77. If such proceeding is now to be dismissed because no plan of reorganization is necessary, the issues as to the subordination of the Southern Pacific claim have, for all practical purposes, become moot. See, *Sword S. S. Line* v. *Vendramis,* 116 F. (2d) 665, 668 (C. C. A. 2d, 1940), *supra.*

Petitioner asserts in his application for extension of time, dated May 21, 1947, that this Respondent and Southern Pacific Company, while contending in their petitions for certiorari (Nos. 879 and 936) that changed conditions required a new plan, "failed to reveal" that the amount of funds on hand and the prospect of future earnings would make it practicable to pay out on July 1, 1947, the sum of $18,331,525. It is a sufficient reply to refer the Court to the petitions in Nos. 879 and 936, in which the greatly improved financial condition of the Debtor is urged at length and in detail. There was, of course, no occasion in said petitions to discuss the Debtor's ability to pay out the sum of $18,331,525, or any other sum, on July 1, 1947, since the Dismissal Program was not formulated until many months later. Both petitions, however, had annexed as exhibits the Debtor's balance sheet as of October 31, 1946, which showed net current assets of $22,090,504, and total cash and temporary cash investments aggregating $23,000,000.

Petitioner also asserts in his application dated May 21, 1947, that The Chase National Bank and The Mississippi Valley Trust Company in their brief in opposition did not disclose that they were willing to consent to extend their notes and reduce the interest rate thereon. As to this assertion, it may be pointed out that the Banks' brief in opposition was filed on February 22, 1947, and that their agreements to extend their notes at a reduced interest rate were not entered into until late in April, 1947.

Conclusion.

The matters occurring subsequent to the filing of the petitions for certiorari have no relevancy whatever to any issue presented by the petition, especially since, as a practical matter, the findings made by the District Court in its order of May 20, 1947 (that the Debtor can now meet its debts as they mature and is no longer in need of reorganization) preclude the possibility of ever consummating the approved Plan, whether fair or unfair.

The petition for rehearing should be denied.

Dated, May 28, 1947.

Respectfully submitted,

Jacob M. Lashly,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for St. Louis Southwestern
Railway Company, Debtor.

Appendix A.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

Program for Dismissal of Bankruptcy Reorganization Proceedings

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I.

Introductory

On December 12, 1935, the St. Louis Southwestern Railway Company filed a petition in the United States District Court for the Eastern District of Missouri, alleging that it was unable to meet it debts as they matured and that it desired to effect a Plan of Reorganization pursuant to Section 77 of the Bankruptcy Act, as amended. On the same date or shortly thereafter similar petitions were filed by three of the Company's subsidiaries. For a period of over 11 years the properties of the Railway Company and its said subsidiaries have been operated under direction of the Court. No Plan of Reorganization has yet been consummated. Although a Plan has been certified by the Interstate Commerce Commission and approved by the Court, it has not yet been submitted to the security holders for vote thereon and it is improbable that the pending Plan of Reorganization can be consummated within the next two or three years.[1] As the result of large interest payments made pursuant to order of the District Court since January 1, 1942, the effective date of the Plan, the carrying out of the Plan would give rise to difficult problems of adjustment and interpretation which might result in pro-

[1] In March, 1942, the Commission certified the Plan to the District Court, which Plan was approved by the District Court in February, 1944. In August, 1946, the Circuit Court of Appeals for the Eighth Circuit affirmed the order of the District Court approving the Plan, except in a relatively minor respect. On March 10, 1947, the Supreme Court denied petitions for certiorari to review the decision of the Circuit Court of Appeals.

tracted litigation. Moreover, if certain proposed legislation were enacted, the Plan might have to be entirely abandoned and a new start made on reorganization if the properties were to remain in the jurisdiction of the Court.

During the 11-year period that the railroad has been operated under jurisdiction of the Court, World War II was begun and has ended, and the financial and physical condition of the Railway Company has so changed that it no longer is in need of reorganization and desires the dismissal of the bankruptcy reorganization proceedings. Its earnings in recent years and its prospective earnings are such that, upon the carrying out of the Program outlined below, it will have discharged all obligations which will be then due and payable, will be in a position to meet all its obligations as they mature, and will have adequate working capital for the efficient maintenance and operation of its railway properties.

II.

Petition for Dismissal of Bankruptcy Reorganization Proceedings

It is contemplated that the Railway Company and/or the Bankruptcy Trustee, and possibly its said subsidiaries, will file a petition with the District Court for a dismissal of the Bankruptcy reorganization proceedings on the ground that the Railway Company and its subsidiary debtors are no longer in need of reorganization and will be able to meet their obligations as they mature after the dismissal of such proceedings and after making the adjustments provided for in this Program. It is also contemplated that, with the approval of the Court, application will be made to the Interstate Commerce Commission for approval of the renewal and extension of certain outstanding notes of the Railway Company, the issuance of certain non-interest-bearing Serial Notes, the repledge of bonds as collateral therefor, and any other steps in connection therewith if such approval is required.

III.

Program of Railway Company in connection with Termination of Bankruptcy Reorganization Proceedings

Upon the dismissal of the bankruptcy proceedings, and subject to the order of the Court, the Railway Company will either pay in full all obligations of principal and interest now in default or will otherwise provide for all of such obligations in a manner consented to by all the holders thereof. Securities in default which are not paid or otherwise provided for will be continued on a current interest basis. The following action will be taken in respect to the various securities and obligations in default:[2]

1. *$10,000,000 Second Mortgage Income Certificates.* All unpaid interest coupons, maturing prior to the closing date, on these Certificates will be paid, and future accruing interest will be paid when and as the same becomes payable pursuant to the provisions of the Second Mortgage.

2. *$21,596,000 First Terminal and Unifying Bonds —Payments and Cancellation.* All the First Terminal and Unifying Bonds (herein referred to as Terminal Bonds) are to be cancelled, the Terminal Mortgage is to be satisfied, and the collateral held by the Terminal Mortgage Trustee turned over to the Chemical Bank & Trust Company, as Trustee for the General and Refunding Bonds (herein referred to as Refunding Bonds), thus stepping up the position of the lien for the Refunding Bonds to the place now held by the Terminal Mortgage. This collapsing of the Terminal Mortgage will be effectuated as follows:

(a) $8,063,000 Terminal Bonds held by the public (the principal being now due and payable by declara-

[2] The closing date has been assumed to be July 1, 1947, for the purpose of the computations herein. Actually such closing date may be later, and in that event adjustments will have to be made. All amounts and computations herein are subject to verification and correction.

tion) will be paid, with accrued interest to the date of payment, the funds therefor to be deposited by the Railway Company in trust with the Guaranty Trust Company of New York, the Terminal Mortgage Trustee.

(b) $13,533,000 pledged Terminal Bonds will be cancelled and surrendered by the Chemical Bank & Trust Company, as Refunding Mortgage Trustee, to the Terminal Mortgage Trustee.

(c) The Terminal Mortgage Trustee will cancel the Terminal Mortgage and deliver all collateral held by it to the Chemical Bank & Trust Company, as Refunding Mortgage Trustee.

3. *$39,557,500 General and Refunding Bonds.* All unpaid interest coupons, maturing prior to the closing date, on the $9,327,500 principal amount of these Bonds held by the public will be paid, and all subsequently accruing interest will be paid when and as the same becomes due. The $13,533,000 Terminal Bonds pledged under the Refunding Mortgage will be surrendered to the Terminal Mortgage Trustee for cancellation, the Terminal Mortgage will be cancelled and all collateral held under that Mortgage delivered to the Chemical Bank & Trust Company, as Trustee under the Refunding Mortgage, as provided in paragraph 2 above. $30,230,000 principal amount of the Refunding Bonds are pledged to secure the 5% Secured Notes held by Southern Pacific Company, The Chase National Bank of the City of New York, and The Mississippi Valley Trust Company, mentioned below. These pledgees will waive the payment of the unpaid interest on the pledged Refunding Bonds accrued to the date of closing and the pledged Bonds will be appropriately stamped to evidence such waiver. They will also waive the payment of all unpaid accrued interest on the pledged Southern Illinois and Missouri Bridge Company Bonds.

4. *$2,241,663 Stephenville North & South Texas Railway Company First Mortgage Bonds.* These Bonds will be paid at the reduced principal amount thereof, with interest to the date of payment, under arrangements similar to those provided for the payment of the publicly-held Terminal Bonds as set forth in paragraph 2(a) above, except to the extent that certain holders thereof may have agreed to accept less than such payment of principal and interest in full.

5. *$932,232 Central Arkansas & Eastern Railroad Company First Mortgage Bonds.* These Bonds will be paid at the reduced principal amount thereof, with interest to the date of payment, under arrangements similar to those provided for the payment of the publicly-held Terminal Bonds as set forth in paragraph 2(a) above, except to the extent that certain holders thereof may have agreed to accept less than such payment of principal and interest in full.

6. *$3,500,000 Chase National Bank 5% Secured Note.* $259,758 on account of interest accrued to July 1, 1947, and $700,000 on account of the principal of this Note will be paid. The Note will be renewed and extended in the reduced principal amount of $2,800,000 and will continue to be secured by the Refunding Bonds and the Southern Illinois and Missouri Bridge Company Bonds now pledged with the noteholder. A Renewal and Extension Agreement will be entered into with The Chase National Bank of the City of New York, setting forth the terms and conditions of the renewal and extension of the Note. Such Agreement will provide that the Note until due will bear interest at the rate of 2½% per annum, payable semi-annually, and that the reduced principal amount will be paid in full by semi-annual payments thereon in equal amounts over a five-year period. This Note, as renewed and extended, will be redeemable without the payment of any premium, as a whole at any time, or in part from

time to time in an amount equal to any one or more of the principal instalments of such Note. No dividends will be payable on the preferred and common stocks of the Railway Company until 50% of the reduced principal amount of the Note has been paid. At the option of the said Bank the Railway Company will, in lieu of entering into a Renewal and Extension Agreement as aforesaid, issue one or more renewal notes to the Bank on the foregoing terms.

7. *$1,000,000 Mississippi Valley Trust Company 5% Secured Note.* $74,442 on account of interest accrued to July 1, 1947, and $200,000 on account of the principal of this Note will be paid. The Note will be renewed and extended in the reduced principal amount of $800,000 and will continue to be secured by the Refunding Bonds and Southern Illinois and Missouri Bridge Company Bonds now pledged with the noteholder. A Renewal and Extension Agreement will be entered into with The Mississippi Valley Trust Company, setting forth the terms and conditions of the renewal and extension of the Note. Such Agreement will provide that the Note until due will bear interest at the rate of 2½% per annum, payable semi-annually, and that the reduced principal amount will be paid in full by semi-annual payments thereon in equal amounts over a five-year period. This Note, as renewed and extended, will be redeemable without the payment of any premium, as a whole at any time, or in part from time to time in an amount equal to any one or more of the principal instalments of such Note. No dividends will be payable on the preferred and common stocks of the Railway Company until 50% of the reduced principal amount of the Note has been paid. At the option of the said Bank the Railway Company will, in lieu of entering into a Renewal and Extension Agreement as aforesaid, issue one or more renewal notes to the Bank on the foregoing terms.

8. *$17,882,250 Southern Pacific Company 5% Secured Note.* $1,017,390 on account of accrued interest will be paid in cash. The balance of accrued interest to July 1, 1947, $1,000,000, will be paid by the issuance by the Railway Company of non-interest-bearing Serial Notes for $1,000,000. The Note in the amount of $17,882,250 presently held by Southern Pacific Company will be renewed and extended in the same principal amount. This Note and the non-interest-bearing Serial Notes will be secured by the Refunding Bonds and Southern Illinois & Missouri Bridge Company Bonds now pledged with Southern Pacific Company. A Renewal and Extension Agreement will be entered into with Southern Pacific Company, setting forth the terms and conditions of the renewal and extension of the $17,882,250 Note. Such Agreement will provide that the Note until due will bear interest at the rate of 3% per annum, payable semi-annually, and that the principal amount will be paid in full by semi-annual payments thereon as hereinafter indicated. This Note, as renewed and extended, will be redeemable without the payment of any premium, as a whole at any time, or in part from time to time in an amount equal to any one or more of the principal instalments of such Note.

During the first five years after the closing, $720,000 a year will be required to make the payments of principal on the renewed and extended Notes to be held by the two above-mentioned banks. The difference between said sum and $1,000,000, or $280,000, will be payable in equal semi-annual instalments to Southern Pacific Company, first on account of the principal of the aforesaid non-interest-bearing Serial Notes and then on account of the principal on the renewed and extended Note for $17,882,250 to be held by that Company. The principal amount of the renewed and extended Note for $17,882,250 will be payable to the

extent of $120,000 on July 1, 1951, then in equal semi-annual instalments of $140,000 during the year ending July 1, 1952, and thereafter in semi-annual instalments of $500,000 each.

$500,000 Gray's Point Terminal Railway Company First Mortgage Bonds. The principal amount and accrued interest of these bonds, which are not in default, will be paid by St. Louis Southwestern Railway Company at their maturity on December 1, 1947.

IV.

Undertakings of Railway Company

The Railway Company, in connection with the dismissal proceedings, will undertake, subject to requisite approval of the District Court and the Interstate Commerce Commission, (a) to make all payments, enter into all undertakings, and take all other steps set forth in the Program, (b) to pay all proper costs and expenses incurred by officers of the Court in the reorganization proceedings and all administrative claims or expenses approved by the Court, (c) to pay all allowances and expenses (including reasonable attorneys' fees) of all committees or other representatives of creditors and stockholders, trustees under indentures, depositaries and other persons, incurred in connection with the proceedings and the Plan of Reorganization as may be approved by the Court within such maximum limitations as may be fixed by the Interstate Commerce Commission, (d) to pay all legal fees and expenses in connection with the dismissal of the bankruptcy reorganization proceedings to the extent required by indentures or other contracts or as may be approved by the Railway Company, and (e) to assume all contracts, commitments and obligations entered into or incurred by the Trustee in the operation of the properties of the Railway Company and all prior contracts, commitments, and obligations of the Railway Company which have not been disaffirmed by the Trustee.

Dated April 7, 1947.

Appendix B.

IN THE

DISTRICT COURT OF THE UNITED STATES,

EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI.

IN THE MATTER *of* ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor.	In Proceedings for the Reorganization of a Railroad. No. 8497

ORDER

LOOKING TO FINAL DISMISSAL OF THESE PROCEEDINGS, AUTHORIZING DEBTOR TO FILE APPLICATION WITH INTERSTATE COMMERCE COMMISSION, AND GRANTING OTHER RELIEF

Upon due consideration of the joint petition of Berryman Henwood, Trustee of the property of St. Louis Southwestern Railway Company, Debtor, and of St. Louis Southwestern Railway Company of Texas, subsidiary debtor, and St. Louis Southwestern Railway Company, Debtor, verified and filed herein on the 30th day of April 1947, for an order dismissing these proceedings and for other relief, and the joint petition having been set down for hearing on the 19th day of May 1947, and having come on to be heard on said date;

And it appearing to the Court that the Trustee, pursuant to order of this Court, dated April 30, 1947, gave reason-

able notice of the time and place of said hearing by mailing a copy of such order by registered mail to the Interstate Commerce Commission, to each subsidiary debtor, to each of the mortgage trustees of the several debtors or their attorneys, to all intervenors herein or their attorneys, and to all other parties to whom the said Trustee customarily sends printed copies of orders entered in these proceedings, all as provided in such order;

And it further appearing to the Court that the Trustee, pursuant to said order of the Court, dated April 30, 1947, duly caused to be published the notice of the time and place of said hearing for three days, each of which was at least ten days prior to the date of said hearing, in the "St. Louis Post-Dispatch", "Dallas News", and "New York Times";

And the Trustee, the Debtor and other parties having appeared by their respective counsel at said hearing on said joint petition and the Court having heard such counsel and the testimony of witnesses thereat and having considered the "Program for Dismissal of Bankruptcy Reorganization Proceedings", dated April 7, 1947 (herein referred to as the Program), annexed to the joint petition and having considered the evidence presented at said hearing and having considered all objections to said joint petition filed herein or made at said hearing;

The Court makes the following

FINDINGS:

1. That the Debtor has, in the possession of the Trustee, sufficient cash, or assets which are the equivalent of cash, to enable it to carry out the Program and, in addition, to meet all proper requirements for working capital and the efficient maintenance and operation of its properties;

2. That the Debtor and its subsidiary debtors are no longer in need of reorganization and that, upon the carry-

ing out of the Program, the Debtor will be able to meet its debts and the debts of its subsidiary debtors as they mature;

3. That, upon the carrying out of the Program, all defaults in the payment of principal and interest on any obligations of the Debtor and its subsidiary debtors and all other defaults or events of default under any of the mortgages, indentures, or securities issued by the Debtor and its subsidiary debtors have been, or will have been, cured or remedied;

4. That, upon the Commission's approval of the extension, renewal, issuance, pledge and repledge by the Debtor of the securities necessary to carry out the Program, in so far as such approval may be requisite, these proceedings should be dismissed, that the respective properties of the debtors held by the Trustee should be returned to them, and that the Debtor should make all payments and take all steps set forth in the Program and assume all obligations of the Trustee and all prior obligations of the Debtor which have not been disaffirmed by the Trustee.

NOW, THEREFORE, it is

ORDERED:

1. That the Debtor is authorized and directed to file an application with the Interstate Commerce Commission under Section 20 (a) of the Interstate Commerce Act for approval of the extension, renewal, issuance, pledge and repledge by the Debtor of such securities as are necessary to carry out the Program;

2. That the jurisdiction of the Court is retained over these proceedings to enter an appropriate order or orders authorizing and directing the Debtor and other parties to consummate the Program and fixing the date for the filing of petitions for allowances; to dismiss the proceedings and to direct the return to the debtors of their respective prop-

erties held by the Trustee; to determine all allowances of fees and expenses; to direct the Trustee to prepare and file a final report and accounting of his administration of the trust estate; to approve the administration of the trust estate, to pass upon the final report and act of the Trustee and to order his discharge and the discharge of his surety; and to grant such other and further relief to which the Debtor and its subsidiary debtors and the Trustee and other parties hereto may be entitled.

(sgd) GEO. H. MOORE,
District Judge.

Dated May 20, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 909

WALTER E. MEYER, INTERVENOR,
Petitioner,

vs.

BERRYMAN HENWOOD, AS TRUSTEE OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY LINES, ET AL.,
Respondents

REPLY BY SOUTHERN PACIFIC COMPANY, ONE OF THE RESPONDENTS, TO PETITIONER'S PETITION FOR REHEARING.

We understand that petitioner, Walter E. Meyer, has filed a Petition for Rehearing in this Court in respect of its order dated March 10, 1947, denying petitioner's Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit; that he has assigned as a ground for such petition, as a new development, a petition filed in the District Court below on April 30, 1947, by the Trustee and the Debtor, requesting a dismissal of the reorganization proceeding on the ground that the Debtor is now solvent. It is also understood that the Debtor, as a respondent herein, believing that this Court should be in-

formed correctly of this development, intends to file a reply to the Petition for Rehearing, setting forth the dismissal program. Since Southern Pacific Company has been a target of petitioner Meyer's accusations, we wish to state briefly what the dismissal program is intended to accomplish and why Southern Pacific Company supports the program as well as all creditors of the Debtor and all of its minority stockholders represented in the reorganization proceeding, except Meyer, support the program.

The earnings of the Debtor continued to be high after the close of the war, and early in 1947 it became apparent that, with some voluntary co-operation by creditors, Debtor is no longer in need of reorganization. On April 30, the Debtor and the Trustee filed with the District Court their petition setting forth the facts concerning Debtor's financial condition and the program for dealing with its creditors. A hearing on the petition was held on May 19, 1947, and, after taking evidence and hearing the parties, the District Court, through the Honorable George H. Moore, on May 20, 1947, made its order approving the dismissal program and directing the Debtor to file with the Interstate Commerce Commission application for authority to issue securities as contemplated by the program.

The dismissal program approved by the District Court greatly benefits Walter E. Meyer as a stockholder, as well as all other stockholders. Under the program, the property will be restored to the Debtor, and the stockholders will have exactly the same legal position as prior to the institution of the reorganization proceeding. As shown at the hearing, their economic position will be greatly improved since the Debtor's interest charges will be reduced from approximately $3,000,000 to approximately $2,000,000 annually, the Debtor will be possessed of large cash balances even after the debt retirements called for by the

program, and physical properties are in excellent condition. In contrast, under the plan of reorganization formulated by the Commission and approved by the courts, all of the stock was completely eliminated.

Southern Pacific Company supports the dismissal program as the interests of all the stockholders, majority and minority, are to be preserved. This objective was assisted by voluntary concessions which it made, as a creditor, as a part of the program. The exact treatment of the note held by it will appear in the program set forth in the Debtor's reply to the Petition for Rehearing. It will be noted that Southern Pacific Company has consented to extend the maturity of the overdue $17,882,250 note held by it, so that other debts may be paid, either immediately or in the future before the Southern Pacific Company note as extended will become due; to reduce the interest rate on the amounts owing it from 5% to 3% annually; and to accept a non-interest-bearing note for a portion of the pastdue interest owing it while all other creditors are being paid all pastdue interest. In order to make the program possible, other creditors also have made substantial concessions.

It is difficult to understand how Meyer can seriously believe, or represent to this Court, that any injury results to him from the dismissal program. The fact is, as pointed out, that the dismissal program places him in a better position than he was before the reorganization was begun. For all the stockholders, for Southern Pacific Company as the majority stockholder, for Meyer as a minority stockholder, and for other minority stockholders, the filing and approval of the dismissal program are most fortunate developments. It is important, in the interest of all the stockholders, that the dismissal program receive expeditious treatment.

A complaint by Meyer that Debtor's $17,882,250 note purchased by Southern Pacific Company from the Recon-

struction Finance Corporation, pursuant to its guaranty, is not subordinated or expunged in the dismissal program is without merit because the Commission and the courts have held that the note should not be subordinated or expunged. A complaint by Meyer that Southern Pacific Company is not compelled by the program to lease the railroad lines of the Debtor is without merit, because the Commission and the courts have held that Southern Pacific Company could not and should not be compelled to enter into a lease with the St. Louis Southwestern Railway Company. There are conflicting views as to whether a lease would be beneficial to the parties. This is a matter for business judgment and, if it should reach such a point, for negotiation between parties free to act.

Conclusion

It is respectfully submitted that the Petition for Rehearing should be denied promptly.

Dated: San Francisco, California, May 23, 1947.

BEN C. DEY,
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Certificate of Service

I hereby certify that I served a copy of the attached reply by Southern Pacific Company in opposition to petition for rehearing on Walter E. Meyer, petitioner, by depositing same in the United States mails in Washington, District of Columbia, with proper postage duly prepaid, this — day of May, 1947.

STANFIELD B. JOHNSON,
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Washington 6, D. C.
Of Counsel for Respondent,
Southern Pacific Company.